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25-CC-2024-000430.00

Judge: EMILY N JOHNSTON

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF CULLMAN COUNTY, ALABAMA

STATE OF ALABAMA V. HARRISON JAMARION ALLEN
25-CC-2024-000430.00

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C001 STATE OF ALABAMA

STATE'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

[Filer: BROCK NATHAN ADAM]

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IN THE CIRCUIT COURT OF CULLMAN COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
vs.	)	Case No. CC-2024-430
	)	
JAMARION ALLEN HARRISON,	)	
Defendant.	)	

STATE'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

COMES NOW the State of Alabama, by and through Champ Crocker, District Attorney, and Nathan A. Brock and Michael Burleson, Assistant District Attorneys, 32nd Judicial Circuit, and files this Response in Opposition to Defendant's Motion to Dismiss with Prejudice for Deliberate State Interference with a Central Defense Witness and Bar Retrial, and in support thereof states the following:

I. Introduction

After the State rested its case and this Court ruled the State had proven a prima facie case of Murder as charged in the indictment, the defense announced it would call K.B. as a witness — and **it was then discovered that the defense, seven days into trial and despite a three-day recess, had never placed its "central and irreplaceable" witness under subpoena.** From that circumstance of his own making, the Defendant moved for the mistrial he now seeks to convert into a permanent bar to prosecution. The State opposed that motion and stood ready to proceed. The Court granted the relief the Defendant requested — declaring the mistrial from the bench “without prejudice at this time”

— but a day later, in its written Order, expressly reserved the question of retrial. The State denies the Motion's accusations of misconduct: it did not seek to silence K.B., did not interfere with the Defendant's right to present a defense, and did not seek — by design or by effect — the end of a trial it fought to continue.

But this Response does not ask the Court to take the State's word for any of that, because **the Defendant's Motion fails on its own telling**. When a defendant obtains a mistrial on his own motion, retrial is barred in only one narrow circumstance: where the prosecutor's conduct was intended to provoke that very motion. This record forecloses that finding — the State fought to keep the jury the Defendant asked the Court to discharge — and every other claim in the Motion seeks a remedy that none of the Defendant's own authorities has ever awarded. **The Motion should be denied.**

The Motion blends two claims that the law keeps separate and answering them requires keeping them separate. The first is a double jeopardy claim. Its question is whether the State intended to end the trial — whether the prosecutor acted to provoke the Defendant into moving for the mistrial he received. If that intent is proven, the remedy is a bar to retrial. But the question is not reached at all unless the defendant first presents substantial evidence of that intent, and it is answered by objective facts about what the State did when the mistrial was on the table.

The second is a due process claim. Its question is whether the State's conduct deprived the Defendant of a witness he was entitled to call. If that is proven, the remedy is a new trial — never a bar to retrial. The Motion offers the second claim's bare allegations as proof of the first claim's intent, then asks for the first claim's remedy. Taken

separately, as the law requires, each fails: the first on the record, the second on both record and remedy.

II. The Defendant's own mistrial motion forecloses his double jeopardy claim.

A. Retrial is barred only where the State intended to provoke the mistrial motion, and substantial evidence of that intent must accompany the motion.

When a defendant moves for and obtains a mistrial, the Double Jeopardy Clause does not bar retrial. In *United States v. Dinitz*, 424 U.S. 600 (1976), the trial judge removed the defendant's lead lawyer from the case for misconduct during his opening statement¹. Given options that included continuing the trial with his remaining counsel, the defendant chose a mistrial. The Supreme Court held that retrial was permitted. A defendant's mistrial motion is a deliberate election to surrender his first jury, and that election removes any double jeopardy barrier to a second trial. *Id.* at 607–10.

The single, narrow exception comes from *Oregon v. Kennedy*, 456 U.S. 667 (1982). There, the prosecutor asked a witness whether he had refused to do business with the defendant “because he is a crook.” The defendant moved for and received a mistrial, then argued jeopardy

¹ Defense counsel's misconduct during opening statements in the present case received a much lesser consequence – merely an instruction to the jury that one of his substantive statement's was false: The Court told the jury: “So at this time, I need to advise you on a curative instruction about one thing that's happened today that you have heard. So, in opening statement, the defense counsel made the following statement: ‘Jamarion you will see is not a person who was forbidden to carry a gun.’ That statement was false. You must disregard it as if it was never said.” The Court's curative instruction was based on the Defendant being forbidden to possess a firearm based on his previous conviction for Burglary Third Degree and being on probation when he shot and killed the victim in this case. *See State of Alabama vs. Jamarion Harrison*, CC-2020-399.

barred retrial. The United States Supreme Court disagreed. Retrial is barred only where the prosecutor's conduct was **intended to provoke the defendant into moving for a mistrial**. *Id.* at 679. Bad faith, harassment, even overreaching are not enough; the prosecutor must have acted for the purpose of ending the trial. *Id.* at 675–76.

Alabama follows *Kennedy* exactly. The Alabama Supreme Court adopted it in *Ex parte Cochran*, 500 So. 2d 1179 (Ala. 1985), affirming in part and reversing in part *Cochran v. State*, 500 So. 2d 1161 (Ala. Crim. App. 1984). Cochran's first capital murder trial ended in a mistrial on his own motion, granted in part because the district attorney had failed to disclose material information about an eyewitness. Cochran argued that the prosecution's overreaching barred a second trial. Both courts held that it did not: a mistrial granted on the defendant's motion bars retrial only where the prosecutor intended to provoke that motion, and misconduct short of that intent does not.

The Alabama Supreme Court restated the threshold in *Ex parte State (In re R.E.D.)*, 304 So. 3d 1170, 1175–76 (Ala. 2020), the decision the Defendant himself cites: before any trial of the intent question is warranted, the defendant must present substantial evidence that could rationally support a finding that the State acted to goad him into moving for a mistrial. Allegations of prejudice do not meet that burden, and neither do allegations of legal or factual error by the State; the evidence must show conduct undertaken for the purpose of provoking the motion. *Id.* Misconduct² and intent to end the trial are different questions. Only the second matters here, and *R.E.D.* requires substantial evidence of it before the question is even reached.

² Again, the State vehemently denies the defense's allegations of misconduct and such allegations are addressed, *infra*.

The Court of Criminal Appeals applied that rule two years ago on facts that track this case. In *Flynn v. State*, 409 So. 3d 80 (Ala. Crim. App. 2024), cert. denied, No. SC-2024-0285 (Ala. July 12, 2024), a State's witness at a capital murder trial gave an in-court identification the defense had not expected. The defendant claimed the State had ambushed him, moved for a mistrial, and received one. He then moved to dismiss the indictment, arguing that the State had provoked his motion and that Article I, § 9 of the Alabama Constitution affords broader protection than *Kennedy*. After an evidentiary hearing, the trial court found no evidence of intent and denied the motion, and the Court of Criminal Appeals affirmed, holding that the *Kennedy* standard governs double jeopardy claims under § 9 and that the record could not support a finding of intent.

The objective fact the court found decisive is the one present here: the prosecutors had “vigorously argued against a mistrial each time Flynn moved for one,” and the defendant offered no evidence, “much less substantial evidence,” that the State wanted the trial to end. *Flynn*, 409 So. 3d at 92–93. The court had already disposed of the identical claim once before, on a petition for a writ of mandamus, for the same reason.

B. Five objective facts foreclose any finding of intent.

That intent cannot rationally be found in this case, because the record answers the question. The State opposed the mistrial. The Court's Order records it: before ruling, the Court asked defense counsel whether any remedy short of a mistrial would allow the defense to proceed; counsel said no and “continued to request a mistrial,” while “[t]he State opposed the motion and requested that the trial proceed.” The Motion concedes the opposition. A prosecutor who wants a mistrial does not argue against one. The Defendant's theory requires this Court

to find that the State schemed to end a trial it was simultaneously fighting to continue.

Kennedy's intent inquiry looks to objective facts and circumstances, and no objective fact is more probative of a prosecutor's intent concerning a mistrial than which side of the mistrial motion he stood on.

Flynn treated that fact as decisive, and the Alabama decision the Motion relies on shows the difference. In *Ex parte Adams*, 669 So. 2d 128 (Ala. 1995), as *Flynn* describes it, the prosecutor asked a witness an improper question he could not justify when the trial court asked him to, “injected race into this case for no purpose,” admitted on the record that he was “afraid this jury [was] going to acquit,” and, so far as the record showed, never argued against the mistrial. *Id.* at 130–31. Those facts raised a factual question about intent.

Flynn distinguished *Adams* on exactly those grounds: where the State argued against the mistrial and the defendant offers no evidence of intent, there is nothing for a factfinder to decide. This record is *Flynn*, not *Adams*. It is *R.E.D.* too: there the State “made extensive argument as to why a mistrial was not necessary,” and the defendant took his mistrial over that opposition. *R.E.D.*, 304 So. 3d at 1171–72.

The record supplies a second objective fact: the State had nothing to gain from K.B.’s silence, because no lawful use of her testimony could hurt the State's case. Her account to the State — disclosed to the defense before trial and attached as Exhibit A — is an account of the Defendant's guilt, and it is set out in Part IV below. The portions of her anticipated testimony the Motion says would have helped the Defendant could never lawfully have reached the jury: as Part IV also

develops, they were barred by multiple independent layers of the rules of evidence, and their only purpose was a jury nullification defense.

And against exactly that material the State had already chosen its instrument — an oral motion to exclude the conduct of the deceased, argued of record to this Court. A prosecutor who wants evidence kept from a jury moves to exclude it and argues the motion; the rules of evidence were already doing everything the Motion imagines threats were needed to do. The State had no reason to silence a witness whose only admissible testimony could not help the Defendant, but would have only corroborated the testimony of the State's witnesses.

The record supplies a third fact. In its opening statement, the State told the jury it would hear from K.B. An opening statement is a commitment; a jury remembers who was promised to it, and it charges an unkept promise to the party that made it. No prosecutor promises a jury the testimony of a witness he has already concluded he cannot call. The promise therefore fixes the order of events. K.B.'s agreement with the State — quoted at length in the Motion — commits to the State the determination whether she has provided full and truthful cooperation, and reserves the State's options upon that determination. Motion ¶ 4(i), (j).

The Court's Order records that the State announced exactly such a determination: an “alleged failure to comply with the terms of her plea agreement,” to be presented by motion in K.B.'s separate case. Whatever the State determined, the opening statement proves it determined it after telling the jury that K.B. would testify — after the trial was underway, after the State had committed to calling her. That sequence is the opposite of a nefarious plan. A prosecutor scheming to silence a witness does not first promise her testimony to the jury and

then absorb the cost of the broken promise without a strong reason to do so.

The merits of the State's determination are not before this Court; if the State pursues enforcement, they will be tested in K.B.'s case, with K.B. represented by counsel and the State bearing its burden. What is before this Court is the direction the record shows: the State's announced plan was to call her.

A fourth fact stands apart from the third. Whatever the State determined about K.B.'s cooperation, its case did not depend on her. When the State rested, the Defendant moved for a judgment of acquittal, and this Court denied the motion. That ruling means the State's evidence, without one word from K.B., was legally sufficient to convict. A prosecutor whose case has just survived a sufficiency challenge, with nothing left before verdict but the defense case, if any is presented, and closing argument, has everything to lose and nothing to gain from the end of the trial. That is the posture in which this State fought the mistrial.

In *Flynn* the trial court found as fact that the State neither intended nor wanted a mistrial, because “things were going very well for the prosecution and there very well may have been a conviction” — a finding drawn from the objective circumstances of the trial. *Flynn*, 409 So. 3d at 88. Here the same conclusion asks nothing of anyone's memory or word. The record supplies it.

The Motion's own chronology supplies a fifth fact. It accuses the State of steering K.B. away from defense process, then concedes that the defense successfully served her that same day. The Court's Order puts the point in the Court's own words: the Court “deferred ruling on the motion to afford the defense an opportunity to obtain service upon

[K.B.],” and the next morning she “appeared in court pursuant to the Defendant's subpoena.” A campaign to hide a witness that ends with the witness served within hours, and appearing under her subpoena the next morning, was not a campaign.

C. The Defendant's manifest-necessity cases do not apply; they govern trials the State ended over the defendant's objection.

Downum v. United States, 372 U.S. 734 (1963), and *Ex parte Sullivan*, 779 So. 2d 1157 (Ala. 2000), are cases about the opposite situation. In *Downum*, the jury was sworn, the prosecution discovered that its key witness on two counts had never been served and was absent, and the trial court discharged the jury at the prosecution's request over the defendant's objection. The Supreme Court held that retrial was barred: the government, having gone to trial unprepared, could not take the defendant's jury from him to cure its own failure of proof.

In *Sullivan*, the State prosecuted a lawyer for perjury; its only witness on the falsity of the statements equivocated for weeks and, when called, invoked the Fifth Amendment; the State moved for a mistrial over the defendant's objection; and the Alabama Supreme Court upheld dismissal because the State, having ended the trial over the defendant's objection, could not show a manifest necessity for doing so. In both cases the trial ended at the State's instance, against the defendant's will.

That is the line the doctrine draws. The “valued right to have his trial completed by a particular tribunal” is implicated where “a mistrial has been declared over the defendant's objection.” *Ex parte Head*, 958 So. 2d 860, 866 (Ala. 2006). A defendant who moves for the mistrial

stands on the other side of that line, and he may not invoke double jeopardy “to relieve himself from the consequences of his voluntary choice.” *Kinard v. State*, 495 So. 2d 705, 708 (Ala. Crim. App. 1986). The roles here were reversed: the defense sought the termination, and the State opposed it. **A defendant who asked the court to discharge his jury was not deprived of anything. He made an election.** *Dinitz*, 424 U.S. at 609–10.

III. The remedy for testimony lost to State interference is a new trial, and the Defendant already has one.

A. Dismissal is unavailable even for deliberate misconduct.

The State denies the Motion's interference allegations. This Court need not resolve that dispute, because even taken at face value, the allegations cannot support the remedy sought. In *United States v. Morrison*, 449 U.S. 361 (1981), federal agents met with an indicted defendant behind her lawyer's back and disparaged her lawyer. The Supreme Court assumed a deliberate Sixth Amendment violation and still held dismissal of the indictment improper. Remedies must be tailored to the injury and must not unnecessarily infringe on competing interests, chief among them society's interest in the prosecution of crime. *Id.* at 364–65.

B. Every witness-interference case the Defendant cites cures lost testimony with a new trial.

The Defendant's witness-interference cases apply the same logic. In *Webb v. Texas*, 409 U.S. 95 (1972), the trial judge singled out the defense's sole witness for a gratuitous and threatening perjury lecture, and the witness refused to testify. The remedy was reversal of the conviction, not dismissal of the charge or a bar to retrial. In *United*

States v. Heller, 830 F.2d 150 (11th Cir. 1987), government agents pressured a defense witness into abandoning the defense; the remedy was a new trial.

In *Thomas v. State*, 418 So. 2d 921, 923 (Ala. Crim. App. 1981), opinion after remand, 418 So. 2d at 924 (1982), the alleged threat against a defense witness earned the defendant an evidentiary hearing **toward the possibility of a new trial** (the very relief which the defendant has already received). And the remand shows what became of it: the trial court found that no threat had been made, the Court of Criminal Appeals observed that the claim was “supported only by the vague factual assertions” of the witness himself, and the conviction was affirmed. *Thomas*, 418 So. 2d at 924. **In every case the Defendant cites, the cure for testimony lost at the first trial is a second trial.**

The Defendant can have his second trial. He asked for it. The mistrial he obtained is precisely the relief the *Webb* line of cases provides, granted before conviction rather than after. His demand for dismissal with prejudice asks this Court to leapfrog every authority in his own Motion and award a remedy none of them has ever granted.

IV. The Defendant cannot show prejudice from the loss of this witness.

A. The claimed prejudice rests on counsel's representations about a conversation counsel never had and falls far short of the plausible showing his own authorities require.

One further observation on the measure of the claimed prejudice, drawn from the Court's own Mistrial Order. The Order records that defense counsel had never discussed with K.B. the substance of her anticipated testimony. The Order is equally careful about the rest: it

describes K.B.’s firsthand knowledge as unique “as represented by the defense,” and it records “the defense’s representation” — not a finding — that no lesser remedy would permit the defense to proceed.

The uniqueness claim itself rests on presence, not content: “[a]ccording to the defense’s proffer, the only people present during material portions of those events were the Defendant, the deceased, and K.B.” When the Court expressly asked whether any remedy short of a mistrial would do, defense counsel said no and “continued to request a mistrial.”

The Motion recasts the Defendant’s own representations as the Court’s determinations — K.B.’s knowledge was “found” unique, the Court “determined” that no lesser remedy would do, the prejudice stands “documented in the Court’s Order” — when the Order attributes each of those propositions to the defense and adopts none of them.

Defense counsel’s professed ignorance is selective. Counsel possessed K.B.’s recorded interview with the lead investigator, and counsel possessed the State’s disclosure of her statements in her discussions with the State. What the defense lacked was not knowledge of K.B.’s accounts — it was an account more favorable than the ones in hand. A defendant cannot demonstrate incurable, case-dispositive prejudice from the loss of testimony no one ever heard, measured against documented accounts he possessed all along.

B. K.B.’s two documented accounts cannot be reconciled, and neither supplies what the defense needs.

What the documented accounts of K.B.’s anticipated testimony say is fatal to the Motion’s premise, because there are two of them and they cannot be reconciled. The first is the account the Motion itself advances. Drawing on what it calls her “prior recorded account” — her

recorded interview with the lead investigator — the Motion asserts, at item fifteen of its inventory, “K.B.’s inability to see the shooting itself.”

The second is the account K.B. gave the State: her proffer, made before her plea agreement existed, see Motion ¶ 4(b) (the agreement's terms governing “any prior off-the-record proffer”), and disclosed by the State to the defense. In it, she watched the Defendant draw a handgun from his waistband and fire on the victim while the victim stood still; he fired without hesitation; she recognized the firearm as one he regularly carried; during his flight he hid the weapon under a shed; and he admitted the shooting in telephone calls. See Exhibit A.

The Court need not decide which account is true, because neither supply what the Defendant needs. Justification turns on a single moment: what the deceased was doing when he was shot. On the Motion's account, K.B. saw nothing of that moment and could testify to nothing about it. On her account to the State, the deceased was standing still — the negation of the imminence the self-defense statute requires. (§13A-3-23).

Nor does either account, or any item of the Motion's seventeen-item inventory, place the deceased in the act of using or threatening force against the Defendant. The items describe the deceased's conduct toward K.B. in the vehicle before the shooting, her messages, and the Defendant's demeanor when K.B. and the victim arrived on scene; not one describes the deceased victim as an aggressor toward the Defendant, and on every account the conduct in the vehicle was over when the Defendant fired.

A witness who either saw nothing of the shooting or saw an unprovoked one is not a witness whose loss deprived the Defendant of a defense. And whichever account K.B. gave on the stand, the other

would have accompanied her there on cross-examination. Her invocation of her Fifth Amendment privilege closed her testimony to both parties.

C. The remainder of the inventory was inadmissible on layered, independent grounds.

What remains of the inventory is matter no jury could lawfully have heard. **The Defendant's own authorities require a plausible showing that the lost testimony would have been both material and favorable to him.** It is a showing the defense cannot make from personal knowledge — the Order records that counsel had not discussed the substance of K.B.'s testimony with her — **so it must rest on the documented accounts, and those accounts are before the Court.**

Beyond the documented account of the shooting itself, the heart of the Motion's inventory — the deceased's specific conduct toward K.B. before the shooting, items four through nine of the Motion's own list — was the subject of the State's oral motion to exclude the conduct of the deceased, argued of record to this Court, and was inadmissible on layered, independent grounds, each sufficient on its own.

Section 13A-3-23(a), Code of Alabama (1975), permits deadly physical force only upon a reasonable belief that unlawful deadly physical force is being used or is about to be used. The standard is present tense: the threat must be occurring or imminent at the moment force is used. The conduct in the vehicle was over before the shooting, the Defendant was not present for it, and no one was in danger when he fired.

Nor was that conduct ever shown to have reached the Defendant, by proffer or otherwise. **But the point does not depend on what he knew.** Even assuming he received a message that the deceased was

behaving inappropriately, a secondhand report of conduct the Defendant did not witness is not a threat to him, is not provocation recognized by law, and does not make the underlying conduct admissible.

Under Rules 401 and 402, Ala. R. Evid., the conduct is irrelevant to every issue in this case. That is the first layer, and it is complete by itself.

A second, independent layer: the same conduct is not provocation recognized by law. Section 13A-6-3(a)(2) reduces murder to manslaughter only where the accused acts under a sudden heat of passion caused by provocation recognized by law. In *Rogers v. State*, 819 So. 2d 643, 662 (Ala. Crim. App. 2001), the Court of Criminal Appeals identified the three provocations Alabama law recognizes: when the accused witnesses his or her spouse in the act of adultery; when the accused is assaulted or faced with imminent assault on himself; and when the accused witnesses an assault on a family member or close relative. Each category requires that the provocation happen to the accused or in his presence.

K.B. was not the Defendant's spouse or a relative and the Defendant was not in the vehicle, so he experienced and witnessed nothing of that ride. *Biggs v. State*, 441 So. 2d 989 (Ala. Crim. App. 1983), forecloses the secondhand-report theory. There, a husband shot his wife after she confessed her infidelity to his face, and the court held that even that confession was not the recognized provocation: knowledge of past conduct, as opposed to witnessing the act itself, does not change the character of a homicide from murder to manslaughter. *Id.* at 992. A message that the deceased was behaving inappropriately carries less than the face-to-face confession *Biggs* held insufficient.

And the information in the defense's own hands pointed the other way on the only moment that matters: K.B.'s documented account has the victim standing still, threatening no one, when he was shot — the negation of the imminence that both justification and heat of passion require.

And a third layer holds even if the first two fell: Rule 403 excludes the vehicle conduct regardless. Its probative value on any live issue is nil. Its only purpose would be to place before the jury the alleged misconduct of a man who cannot answer it, and to invite a verdict on whether the deceased deserved what happened to him rather than on the elements of the offense — nullification by character evidence, the precise unfair prejudice the rule exists to prevent.

The inventory thus reduces to this: on the moment that decides justification, K.B.'s accounts offer the Defendant either nothing or an unprovoked shooting; the portions that could have helped him were portions no jury could lawfully hear, and their only use was to invite nullification on inadmissible accusations against a man who could not answer them; and the portions a jury could hear show the Defendant drawing a handgun and firing, without hesitation, on an unarmed man who was standing still.

D. No continuing prejudice survives to the retrial.

Nor is there any “continuing” prejudice a new trial cannot cure. The Motion asserts that the State gained advance knowledge of the defense's strategy. Nonsense. The record is the reverse. The trial ended before the Defendant presented any evidence: the defense disclosed no witnesses, no testimony, and no case. The State, by contrast, presented its entire case-in-chief — every witness, every exhibit, everything but

its closing argument. If the mistrial handed either party a preview of the other's case, it handed one to the Defendant.

And the strategy the State supposedly discovered was never a secret: the Defendant had announced in prior filings and hearings that he would claim self-defense. His opening gave nothing away that the file did not already contain. And the “anticipated testimony” of K.B. that the State supposedly extracted rested, by the Motion's own account, on her recorded interview with the lead investigator, her plea agreement, and her own communications — materials the State possessed all along.

As for K.B.’s testimony at retrial, nothing about the end of the first trial forecloses it. If the State seeks enforcement of her plea agreement, that question will be adjudicated in her case, with K.B. represented by counsel and the State bearing the burden of proving a breach — exactly the judicial process the Defendant's own authorities require. *Jackson v. State*, 659 So. 2d 994 (Ala. Crim. App. 1994); *Ex parte Blackman*, 312 So. 3d 1246 (Ala. 2020). If the State does not seek enforcement, the impediment the Motion projects never materializes at all. The Defendant's claim of permanent, incurable witness loss is a prediction about proceedings that have not happened — and may never happen — offered as though it were an accomplished fact.

V. Enforcing a cooperation agreement is not unconstitutional interference.

A. The agreement's own terms reserve the State's remedies.

The Motion quotes K.B.’s cooperation agreement at length, and the quoted terms defeat the Motion's premise. K.B.’s youthful-offender adjudication was expressly contingent upon her “full, truthful, and

continuing cooperation,” and she agreed that upon a failure to cooperate the State could move to set aside the adjudication and restore the case to the adult docket on the original charge. A defendant may bargain away protections in exchange for leniency, and the State may invoke the remedies the bargain reserves. *Ricketts v. Adamson*, 483 U.S. 1, 9–12 (1987) (defendant who breached his cooperation agreement was properly prosecuted on the original charge pursuant to the agreement's terms).

B. Whether K.B. breached her agreement is not before this Court.

Whether K.B. breached her agreement is not before this Court in this matter, and the State will not litigate that question in this Response. The District Attorney told this Court as much at the time: any grounds would be presented by motion in K.B.'s case, not argued extemporaneously in this one. The Court's Order records it the same way — the State “announced that it intended to file a motion in [K.B.'s] separate criminal case seeking to set aside or withdraw her previously accepted youthful-offender adjudication.” Whether to pursue enforcement of the agreement — or to forgo it — is committed to the State's discretion. This Court has already ruled as much by signing off on K.B.'s plea agreement in her case.

A single observation from the trial record suffices here. Defense counsel recited in open court the substance of the State's private communications with K.B. concerning her agreement — communications to which the defense was not a party.

C. The State announced a motion directed at protecting the witness's constitutional rights, not a threat.

Webb condemns something else entirely: a gratuitous judicial threat delivered from the bench to a witness who had done nothing, with no basis and no process. What the State announced here was its intent to *seek withdrawal by motion* of K.B.'s plea agreement— addressed to this Court, on grounds to be stated, with the burden on the State. That is not a threat of unilateral action.

It is the initiation of the exact judicial process that *Jackson* and *Blackman* hold is required before an accepted plea may be disturbed. *Blackman* itself condemned the opposite of process: a plea withdrawal ordered *sua sponte*, on no party's motion. *Blackman*, 312 So. 3d at 1247. The process it requires is the one the State announced. The Defendant cannot cite *Jackson* and *Blackman* for the proposition that only a court may set aside K.B.'s adjudication and simultaneously condemn the State for announcing that it would ask the court to do exactly that.

D. The announcement came at the only moment it could, and it produced counsel for the witness.

The Motion's quarrel with the timing of the announcement collapses on the Court's own Order and on the Motion's own account. K.B. was about to be examined on voir dire, without counsel, concerning her communications with the State — communications whose very subject, by the Motion's telling, was her conduct under her agreement. No examination about those communications could proceed without reaching that conduct. The District Attorney requested permission to be heard before the examination began and requested this Court to appoint K.B. a lawyer.

The Court appointed independent counsel for K.B.: protection she did not have, and would not otherwise have received, before being examined. The Order states why: “[b]ecause [K.B.] potentially faced legal consequences arising from any testimony she might provide.” That is the Court's own finding that her exposure was real and arose from her testimony — not a threat the State invented.

And whatever the forum, the substance was unavoidable. No appointed counsel could competently advise K.B. without learning the State's position on her agreement, and the advice — grounded in her actual circumstances — would have been the same had the State raised the matter at sidebar, in chambers, or by written motion.

Webb condemns intimidation added to a witness's circumstances. **It does not condemn accurate disclosure of a witness's legal position, made with the Court's permission before she was examined about the very conduct at issue, resulting in the appointment of counsel and an informed, independent assertion of her own privilege.** The alternative the Motion implies is that the State should have said nothing — permitted an unrepresented witness to be examined about her own conduct while the State silently held an unresolved question about her agreement and then acted on whatever she said. That course, not the one the State took, is the one that would have deserved this Court's condemnation. Candor required the disclosure, and the Court's protection of K.B. is what the disclosure produced.

One more word on timing. *Webb* condemns a gratuitous threat — one the occasion did not call for. The Motion's complaint runs the other way: that the State did not raise K.B.'s agreement earlier, in more forums, on more occasions. But before September 1, no occasion required it. The enforcement decision was and remains discretionary,

and no rule obliges the State to announce a contemplated motion in another case before anyone proposes to examine the witness it concerns. The occasion arrived when K.B. was called to the stand to be examined about her dealings with the State — the moment her exposure became concrete and her lack of counsel became intolerable. The State spoke once, then, with the Court's permission. The Motion's theory would have had the State speak either sooner, gratuitously, or not at all — leaving K.B. to testify blind.

E. K.B.'s privilege was inherent in her position and invoked on independent advice.

K.B.'s invocation of the Fifth Amendment followed the appointment of independent counsel and consultation with him — a protection this Court itself provided. The Order describes that consultation with care: Mr. Drake advised her “concerning her privilege against self-incrimination and the possible consequences of testifying”; she “had been afforded sufficient time to consult with him”; and his representation to the Court was made “[w]ithout disclosing any privileged communications.” The account the Motion treats as the complete explanation of her invocation is one her own counsel expressly limited — a deliberately partial statement, covering her privilege and her circumstances generally, that the Motion reads as a single-cause narrative.

K.B.'s privilege was hers to invoke, on her own lawyer's advice, in light of her own conduct and her own exposure. And the source of that exposure is itself on display in the record: the State's private communications with K.B. did not stay private, and it was defense counsel, not the State, who demonstrated as much in open court.

The legal jeopardy her counsel weighed arose from her own conduct, not from the State's announcement of it. The Constitution does not treat a witness's valid assertion of her own rights, on the advice of her own counsel, as State suppression of testimony.

That privilege was also never the State's creation. The Motion treats K.B. as an ordinary witness whom the State frightened off the stand. The record shows a witness whose exposure needed no help from anyone. She was charged with murder arising from this same incident, as the Motion itself recites. The account the Motion advances from her recorded interview has her unable to see the shooting; the account she gave the State has her watching it happen. Both were in the defense's hands long before trial. Testimony consistent with either contradicts the other.

That exposure existed on August 31, when the defense first sought her testimony, exactly as it existed on September 1, when independent counsel advised her. Remove the plea agreement the Motion attacks, and K.B. stands where she stood before it existed: a murder defendant with two irreconcilable accounts of the homicide, asked to testify about it under oath — a witness whom no competent counsel permits to testify, and who invokes the privilege as surely as she did here.

Her testimony was never freely available to anyone. The defense's claimed entitlement to her “free and unhampered” testimony imagines a witness who never existed in this case. The State did not manufacture her privilege, and no conduct of the State was necessary to produce its assertion.

VI. The demand for the State's internal files should be denied.

The Motion asks this Court to order the State to disclose “all communications, records, and electronically stored information” concerning K.B., her mother, her plea agreement, her anticipated testimony, and the State's enforcement decision. That demand sweeps in the State's entire trial-preparation file for a central witness. Rule 16.1, Ala. R. Crim. P., withholds from defense discovery internal State documents made by the district attorney and his agents in connection with the investigation and prosecution of the case, and the attorney work-product doctrine applies with full force in criminal proceedings. *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Nobles*, 422 U.S. 225, 236–38 (1975). Counsel's mental impressions, evaluations, and strategy receive near-absolute protection.

And the demand seeks what the State has already given. The State disclosed to the defense K.B.'s recorded interview and the substance of her statements in her discussions with the State — a disclosure the State made while expressly noting its work-product objection. See Exhibit A. The material bearing on K.B.'s anticipated testimony is in the defense's hands.

What remains in the State's file is precisely what the rule and the doctrine protect: the prosecution's notes, evaluations, and deliberations. A demand that begins where disclosure ended is a demand for work product by definition.

The demand also asks this Court to open the State's deliberations over enforcing a cooperation agreement — a core exercise of prosecutorial discretion. In *United States v. Armstrong*, 517 U.S. 456 (1996), defendants claiming selective prosecution sought discovery into the government's charging decisions. The Supreme Court refused:

a “presumption of regularity” attaches to prosecutorial decisions, and courts do not order discovery into them absent clear evidence of impropriety. *Id.* at 464–65.

The Motion's allegations, unsupported, contested and unproven, do not approach that threshold. And the evidentiary hearing the Motion requests is the same demand through another door: what it cannot obtain as documents — the State's deliberations over enforcing its agreement — it proposes to take through a hearing instead. The presumption of regularity does not evaporate because the discovery is taken orally. And a hearing on this Motion would work the same diversion of prosecutorial resources and disclosure of trial strategy that *Armstrong* condemns. 517 U.S. at 468.

The State does not resist preservation and will preserve records relating to K.B. pending resolution of this Motion and of any enforcement proceedings in her case. No order is required; preservation is the State's ordinary practice. The disclosure demand is another matter entirely. It is overbroad on its face: bounded by no time period, no subject-matter limitation, and no connection to the claims actually pleaded, it reaches every note, evaluation, and communication in the State's file concerning the witness. It should be denied.

VII. There is no legal basis for an evidentiary hearing.

A. A hearing could lead to no relief the Defendant does not already have.

Thomas directs a hearing where the allegations, if proven, would entitle the defendant to relief. The State denies these allegations. And the Court's Order, which the Motion invokes as confirmation of its narrative, contains no finding of misconduct, threat, or improper communication by the State. By its own terms it rests “solely upon the

circumstances stated above”: the State's announced motion, the appointment of counsel, K.B.'s invocation on her counsel's advice, and the defense's own representations about her testimony.

But the Court need not resolve that dispute, because the allegations, even if proven, would entitle the Defendant to nothing more than he already has. *Thomas* itself shows why. The court there remanded for a hearing because the remedy the defendant sought — a new trial — was available if his allegations proved true; the hearing was the means to that relief. Here, a mistrial has already been granted.

A hearing in this posture would find facts in search of a remedy the law does not provide, and *Thomas* authorizes hearings that can lead to relief, not hearings for their own sake. The Motion's requested findings divide into two sets, and each is foreclosed on its own ground. The requested findings concerning the State's communications with K.B. go to the interference claim, whose only remedy is the new trial the Defendant has. The requested finding concerning the State's intent to provoke a mistrial goes to the double jeopardy claim, which is governed by *R.E.D.*: no substantial evidence, no factual proceeding.

B. The Motion's allegations are unsworn, and counsel's account of what others said is not evidence.

The Motion's requested findings also arrive unsworn: the Motion attaches no affidavit from K.B., from her mother, or from either of the unnamed persons on whose secondhand accounts its central allegations rest — only counsel's relation of what others are said to have said. Counsel's account of what others said is not evidence. *Flynn*, 409 So. 3d at 93 (citing *Shanklin v. State*, 187 So. 3d 734, 783 (Ala. Crim. App. 2014)) (defense counsel's in-court assertions about what the prosecutor had told him were “not evidence”).

Nor is *Thomas* to the contrary on this point. The hearing there was triggered by a first-hand account: the witness's own appointed counsel stated on the record what the prosecutor had told him — a threat communicated to that counsel directly, which the State did not deny. Nothing of the kind is before this Court. Mr. Drake's representation asserts no threat; it recounts advice grounded in K.B.'s circumstances, made, on its face, “[w]ithout disclosing any privileged communications.” What remains are the relations of two unnamed persons, offered without oath.

C. *R.E.D.* requires substantial evidence with the motion before any factual proceeding.

And *R.E.D.* fixes the gate on exactly this posture. The defendant there moved to dismiss after a mistrial granted on his own motion over the State's objection, alleged that the State had goaded him, submitted no evidence with his motion — the opinion says so twice — and demanded a factual proceeding on the State's intent. The trial court summarily denied the motion, without a hearing.

The Court of Criminal Appeals ordered further proceedings on the intent question; the Alabama Supreme Court reversed: “[t]o be entitled to a jury trial on prosecutorial intent, *R.E.D.* was required to present substantial evidence in support of his motion that the State committed misconduct with the intent to goad him into filing a motion for a mistrial.” *R.E.D.*, 304 So. 3d at 1177; see *id.* at 1175–76.

The burden is the movant's, and it attaches to the motion itself. *R.E.D.* states the rule in terms of a jury trial on intent; the Motion asks for a bench hearing instead; the gate does not move, because what it measures is the motion's evidence, not the identity of the factfinder. The two dissenting Justices read the rule exactly that way — as requiring

substantial evidence with the motion on pain of “a *sua sponte* summary denial of their motion by the trial court,” *id.* at 1178–79 (Bryan, J., dissenting) — and that objection did not carry.

Smith v. State, 745 So. 2d 284, 288 (Ala. Crim. App. 1998), applied the rule to a request that looks like this one: at the hearing on their renewed motion, the defendants announced the testimony they proposed to take and made no offer of proof as to any of it. The Court of Criminal Appeals held that the trial court did not err in refusing any factual determination on the question.

D. Neither claim improves with a hearing.

Even had the Defendant supported his motion with such evidence, it would have been evidence for the interference claim — **the claim whose full remedy the Defendant already holds — not evidence that the State intended to end the trial.** On intent, the objective record already answers, and answers rationally in only one direction: the State promised K.B.’s testimony to the jury in its opening, presented a complete case this Court held sufficient, and fought to keep the jury it had. A motion unsupported by evidence does not earn a proceeding convened to go looking for some, and the unsworn relation of anonymous hearsay is not substantial evidence of anything.

Beyond that threshold failure, the double jeopardy claim fails on a record fact no hearing can change: the State opposed the mistrial the Defendant requested. The interference claim fails on both record and on remedy: its cure under every authority the Defendant cites is a new trial, and the new trial has been granted. The findings the Motion asks this Court to make about K.B.’s plea agreement belong, if the State seeks enforcement, in proceedings in her own case, where she will be heard with counsel and the State will bear its burden. An evidentiary

hearing in this case would litigate questions whose answers cannot alter the disposition of this Motion.

E. The hearing would be discovery the rules forbid.

The hearing request should also be seen for what it would accomplish. Rule 16.1 shields the State's internal documents and deliberations from discovery, and nothing in Alabama's rules entitles a defendant to explore them through a proceeding instead.

That is discovery the rules do not allow, obtained through a motion the law does not support. Cf. *Armstrong*, 517 U.S. at 468 (discovery into prosecutorial decision-making diverts the government's resources and discloses its strategy). The Court should decline to let a jeopardy motion that fails as a matter of law function as discovery into the State's deliberations.

VIII. An express determination that no prosecutorial misconduct occurred is both appropriate and necessary.

The Motion asks for more than dismissal. It asks this Court to find that the State's lawyers engaged in deliberate misconduct, and to refer them to the Alabama State Bar on the strength of that finding. An accusation of that kind does not expire when the motion carrying it is simply denied.

The State therefore asks for an express finding that there was no occurrence of prosecutorial misconduct. That determination requires no hearing and no findings of fact, because it is the determination the denial itself entails. The Court's own Order contains no finding of misconduct and rests solely on the circumstances it recites. The Motion's allegations arrive unsworn. And the conduct the record does establish — a proffer disclosed to the defense, a witness promised to

the jury, a motion announced to the Court, and a State that fought to keep the jury it had — is lawful process from beginning to end. The prayer for a referral to the Alabama State Bar fails for the same reason and should be denied with the rest of the Motion: a referral cannot rest on findings never made and evidence never offered.

IX. Conclusion

The Defendant asked this Court to discharge his jury, and the Court did so over the State's objection. That election forecloses his double jeopardy claim under *Dinitz* and *Kennedy*, and no substantial evidence — indeed nothing sworn at all — supports the intent that *R.E.D.* requires before the question may even be examined.

The Defendant's interference claim seeks a remedy his own authorities have never awarded: every case he cites cures lost testimony with a new trial. The witness he calls irreplaceable was a charged participant whose privilege was inherent in her position, invoked on the advice of independent counsel this Court appointed after the State disclosed her legal position rather than let her testify blind. The testimony he calls central was, on the two documented accounts of it, either silent on the only moment that matters, inadmissible on multiple independent grounds, or evidence for the State. The State's file is protected by rule and doctrine, and the State has already disclosed everything bearing on her anticipated testimony.

There is nothing to hear, nothing to produce, and no relief to grant. The Defendant received the mistrial he requested. He is not entitled to convert it into immunity from trial.

WHEREFORE, PREMISES CONSIDERED, the State of Alabama respectfully requests that this Honorable Court enter an Order (i) denying the Defendant's Motion to Dismiss with Prejudice for

Deliberate State Interference with a Central Defense Witness and Bar Retrial in its entirety and (ii) expressly finding that there was no occurrence of prosecutorial misconduct.

Respectfully submitted this 8th day of September 2026,

/s/ R. Champ Crocker

R. Champ Crocker

District Attorney

32nd Judicial Circuit

/s/ Nathan A. Brock

Nathan A. Brock

Assistant District Attorney

/s/ Michael Burleson

Michael Burleson

Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on all attorneys of record by filing the same with the AlaFile electronic filing system on September 8, 2026.

/s/ Nathan A. Brock

Nathan A. Brock

Exhibit A

While the State maintains the position that details of our office's discussions with witnesses are protected as work product, nevertheless we are providing the following information from our discussions with [K.B.]. [K.B.] stated to us that:

- She saw the Defendant draw a handgun from his waistband and shoot the victim away while the victim stood still, and that the Defendant fired without hesitation.
- She knew recognized the firearm as one the Defendant regularly carried and had seen with earlier that night.
- Ms. McGinnis picked up both her and the Defendant and, at his direction, drove the Defendant to an apartment in Fairfield.
- The Defendant drove her car away, and made two or three telephone calls during which he admitted to shooting the victim.
- As they approached the interstate the Defendant saw two law-enforcement officers, sped up, and pulled off into a driveway.
- During the flight from the murder scene, the Defendant pulled over at a house and hid the murder weapon under a shed.
- The Defendant made her walk through a wooded; that a man in a work truck then picked them up and drove them to a church.
- Molly McGinnis arrived and picked up both of them; they dropped the Defendant off in Fairfield.