

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION**

**RALPH ARNOLD SMITH, JR.**

**PLAINTIFF**

**VS.**

**CAUSE NO. 4:12-CV-113-DAS**

**JAMES M. HOOD, III, IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL FOR  
THE STATE OF MISSISSIPPI;**

**WILLIE DEWAYNE RICHARDSON, IN HIS  
OFFICIAL CAPACITY AS THE DISTRICT  
ATTORNEY FOR THE FOURTH CIRCUIT  
COURT DISTRICT OF MISSISSIPPI,**

**and**

**TIMOTHY H. JONES, IN HIS OFFICIAL CAPACITY  
AS AN ASSISTANT DISTRICT ATTORNEY FOR  
THE FOURTH CIRCUIT COURT DISTRICT OF  
MISSISSIPPI**

**DEFENDANTS**

**MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW Ralph Arnold Smith, Jr. (Dr. Smith), through counsel, pursuant to Rule 65 of the *Federal Rules of Civil Procedure*, and 42 U.S.C. §1983, and files this, his *Motion for Preliminary Injunction*, and in support thereof would respectfully show the following:

1. Dr. Smith filed his *Amended Complaint for Injunctive and Declaratory Relief* in this action on December 3, 2012, which he incorporates into this motion as if copied in full herein.

2. Dr. Smith is entitled to a preliminary injunction enjoining the Defendants from pursuing the capital murder charge against Dr. Smith that is pending in cause number 2012-0208 in the Circuit Court of Leflore County, Mississippi.

3. This court has jurisdiction to grant the preliminary injunction that Dr. Smith requests in his *Amended Complaint* and in this motion. Dr. Smith is not required to exhaust his state remedies prior to seeking relief from this court under 42 U.S.C. §1983. Dr. Smith's claims arise under federal law and should be adjudicated under federal law.

4. At Dr. Smith's November 5, 2012 arraignment, Judge Breland Hilburn set a trial date of April 22, 2013 and a motion deadline of December 5, 2012.

5. On December 6, 2012, three (3) days after Dr. Smith filed his December 3, 2012 *Amended Complaint for Injunctive and Declaratory Relief* in this Court, and one (1) day after Dr. Smith filed 17 pretrial motions in both pending cases, Judge Hilburn, sua sponte, by email, scheduled a December 13, 2012 "rescheduling conference". A true and correct copy of Judge Hilburn's December 6, 2012 email is attached as Exhibit "A".

6. On December 13, 2012, at Judge Hilburn's "rescheduling conference", Judge Hilburn, sua sponte and without notice, set a new trial date of February 4, 2013.

7. There was no motion or request by any defendant or by counsel for any defendant to move the trial date back 2 ½ months to February 4, 2013.

8. The trial court judge never indicated prior to the judge's "rescheduling conference", at least to Dr. Smith's counsel, that the trial court judge had any intention of moving the trial from its April 22, 2013 setting.

9. At the December 13, 2012 “rescheduling conference”, Judge Hilburn indicated that he would not consider anything substantive, since Derrick Lacy’s attorney could not attend. The judge then proceeded to do something very substantive: move a capital murder trial back in time 2 ½ months to February 4, 2013---thirty-two (32) business days away (excluding holiday closings).

10. Dr. Smith is entitled to a preliminary injunction because:

- a. there is a substantial likelihood that Dr. Smith will prevail on the merits in seeking a permanent injunction and in seeking declaratory relief, because the state is pursuing a capital murder charge that is not supported by the facts or by the law; and further, because the state is pursuing a capital murder charge that is based on the killing of Keaira Byrd during AG Hood’s unlawful police operation at Lee Abraham’s office; and further, the Defendants are using illegally obtained evidence;
- b. there is a substantial threat that Dr. Smith will suffer irreparable harm if the injunction is not granted because the state will continue to unlawfully seek the death penalty or life in prison; and the Defendants will continue to unlawfully prosecute Dr. Smith;
- c. Dr. Smith’s threatened injury of the death penalty or life in prison, on it’s face, outweighs the threatened harm to the Defendants; and
- d. Granting the preliminary injunction will serve the public interest because the Courts have a strong interest in protecting citizens from unlawful and illegal prosecution by the government.

1. **A SUBSTANTIAL LIKELIHOOD THAT DR. SMITH WILL  
PREVAIL ON THE MERITS**

Capital Murder Not Supported by the Facts or the Law

11. The capital murder indictment is not supported by the facts, because Dr. Smith did not kill Keaira Byrd. An Investigator with the Attorney General's Office killed Keaira Byrd.

12. The plain and clear language of the Mississippi capital murder statute does not support the capital murder indictment. Mississippi Code §97-3-19(2)(e) defines capital murder as:

The killing of a human being without authority of law  
by any means or in any manner . . . in the following cases . . .  
(d) When done with or without any design to effect death,  
**by any person engaged in the commission of the  
crime of . . . burglary . . .** or in any attempt to commit such felonies.

Mississippi Code § 97-3-19(2)(e).

13. There is a substantial likelihood that Dr. Smith will prevail on the merits of his claim for a declaratory judgment. As a matter of substantive due process, Dr. Smith cannot be legally charged with and convicted of capital murder for the AG Investigator's killing of Keaira Byrd. As a matter of substantive and procedural due process, the Defendants cannot legally charge and prosecute Dr. Smith for capital murder because the AG Investigator killed Keaira Byrd while the Attorney General's Office was clearly violating the separation of powers doctrine.

14. The Defendant's actions in charging and prosecuting Dr. Smith for capital murder are totally devoid of the procedural and substantive due process that is guaranteed

to Dr. Smith by the Fifth and Fourteenth Amendments to the Constitution of the United States.

15. Other courts have concluded that, using these facts, Dr. Smith would not be liable for capital murder. For example, the Louisiana Supreme Court held that:

Our approach is in accordance with that taken by the vast majority of states that have considered this issue. Generally referred to as the “agency” theory of liability, this approach holds that “the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise.”

**Therefore, a felon is not liable for his co-felon's death if the co-felon is killed by a victim or a police officer attempting to thwart the crime** [emphasis added, internal citations omitted].

*State v. Myers*, 760 So.2d 310, 315 (La.2000).

16. The Louisiana Supreme Court recognizes that in the “vast majority of states that have considered this issue”, there can be no liability for capital murder when a police officer kills. See *State v. Myers* (La.2000).<sup>1</sup>

17. The rationale of the Louisiana Supreme Court applies to the Mississippi capital murder statute---the Attorney General’s Investigator killed Keaira Byrd, and Dr. Smith cannot be lawfully charged with capital murder for the AG Investigator’s unlawful killing.

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<sup>1</sup> This would be especially true when, as in this case, the “police officer” who killed is a member of the judicial branch of government, and was unlawfully participating in an executive branch police operation.

18. At least ten (10) other states have reached the same conclusion: Kansas, North Carolina, Tennessee, Virginia, Delaware, Maryland, Pennsylvania, Massachusetts, Idaho and Nevada. See attached Chart, marked as Exhibit "B".

19. As a matter of due process under the Fifth Amendment and the Fourteenth Amendments to the Constitution of the United States, Dr. Smith cannot be charged with or tried for capital murder. 42 U.S.C. §1983 provides this Court with a mechanism and remedy to enjoin these Defendants from continuing under color of state law to intentionally deprive Dr. Smith of the due process that is guaranteed under the Constitution of the United States.

The Attorney General Conducted an Unlawful Police Operation

20. The Attorney General is a member of the judicial branch of Mississippi government. It is especially important to note that the drafters require that the attorney general shall have the same qualifications as circuit and chancery judges, who also are members of the judicial branch:

Article 6. Judiciary  
Section 173. Attorney-general

There shall be an attorney-general elected at the same time and in the same manner as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney-general shall be the same as herein prescribed for judges of the circuit and chancery courts.

Article 6, §173, Mississippi Constitution.

21. The Attorney General (a member of the judicial branch) regularly issues legal opinions that prohibit simultaneous service in more than one branch of government. For example, the Attorney General's Office issued the following pertinent legal opinions:

a. Law enforcement officers are members of and perform core functions in the executive branch of government. *See* Attorney General Jim Hood's Opinion Number 2008-00521, dated October 8, 2008.

b. Mississippi Constitution Article 1, §1 and §2 prohibit simultaneous service in the executive and judicial branches. *See* Attorney General Mike Moore's Opinion Number 1996-0130.

c. Separation of powers prohibits a member of the judicial branch from also serving in the executive branch. *See* Attorney General Jim Hood's Opinion Number 2004-0241.

22. The separation of powers between the judicial, legislative and executive branches of government is a bedrock principle that has been in place for over 200 years. The bedrock rule that a constitution controls over legislative acts dates at least to *Marbury v. Madison* in 1803:

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

*Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803), 1803 WL 839, at page 177.

23. Attorney General Jim Hood, a member of the judicial branch of government, cannot lawfully perform law enforcement and police functions that are solely the function of the executive branch of government.

24. The separation of powers "...is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital...namely, to preclude a commingling of these essentially different powers of government in the same hands..." *O'Donoghue v. United States*, 289 U.S. 516, 530, 53 S.Ct. 740, 743 (1933), cited by *Myers v. City of McComb*, 943 So.2d 1 (¶15) (2006).

25. "These principles (separation of powers) are with us, fundamental, and cannot be disregarded...". *Myers v. City of McComb*, ¶16.

26. Under the separation of powers doctrine dating from *Marbury v. Madison*, there is no legislative authority that allows Attorney General Jim Hood to conduct executive branch police operations.

27. The performance of executive branch police functions by members of the judicial branch, under color of state law, deprives Dr. Smith of rights guaranteed to him under the Constitution of the United States, to-wit: his due process rights and his right to be protected against unreasonable searches and seizures.

28. The state also seeks to use evidence against Dr. Smith under color of state law that was unlawfully obtained from Derrick Lacy after Mr. Lacy asked for a lawyer, in direct violation of the protections guaranteed by the Sixth Amendment.

29. Drafting the "Underlying Facts and Circumstances" is a law enforcement function, used by law enforcement to obtain search warrants. The "Underlying Facts and Circumstances" that led to the search of Dr. Smith's home and cancer clinic was drafted



by a member of the judicial branch (an employee of the Mississippi Attorney General's Office).

30. The "Statement of Underlying Facts and Circumstances" is void ab initio, because the Statement was unlawfully drafted by one or more members of the judicial branch.

31. The use of the "Statement of Underlying Facts and Circumstances" by the judicial branch to obtain search warrants of Dr. Smith's home and cancer clinic is a clear violation of the separation of powers doctrine and the common law doctrine of incompatible offices.

32. The Defendants used and continue to use the Attorney General's unlawful police operation of April 28, 2012 to unlawfully prosecute Dr. Smith for capital murder under color of state law.

33. The Defendants' unlawful prosecution of Dr. Smith deprives Dr. Smith of the substantive and procedural due process rights that are guaranteed to Dr. Smith under the Fifth and Fourteenth Amendments to the Constitution of the United States.

34. Defendants seek to use the Attorney General's unlawful police operation, under color of state law, to unlawfully seek the death penalty or life in prison.

35. The Defendants' use of the Attorney General's unlawful police operation has deprived and continues to deprive Dr. Smith of his substantive and procedural due process rights under the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

36. The Defendants' use of the Attorney General's unlawful police operation (including the unlawful drafting and use of the "Statement of Underlying Facts and

Circumstances”) is a continuing and ongoing use of illegally obtained evidence that was unlawfully obtained under color of state law in violation of Dr. Smith’s Fourth Amendment right to be protected from unreasonable searches and seizures.

37. This court has the authority and jurisdiction to utilize the equitable relief allowed by 42 U.S.C. §1983 to enjoin these Defendants from continuing to pursue the unlawful and unconstitutional capital murder prosecution against Dr. Smith.

Defendants Seek to Use Unlawfully Obtained Evidence in  
Violation of Dr. Smith’s Fourth Amendment Rights

38. An employee of the Attorney General’s Office drafted the “Statement of Underlying Facts and Circumstances”, with the assistance of Defendant Timothy H. Jones (ADA Jones).

39. The “Statement of Underlying Facts and Circumstances” is signed under oath by Detective Sergeant Jeff Byars of the Greenwood Police Department. A true and correct copy of the “Statement of Underlying Facts and Circumstances” is attached and marked Exhibit “C”.

40. The “Statement of Underlying Facts and Circumstances” contains material falsehoods that are indispensably related to the state’s claim of probable cause. These material falsehoods include, but may not be limited to:

**“Exchange of Gunfire”: No Bullet Casing From Keaira Byrd’s Weapon**

41. Detective Jeff Byars states under oath on information and belief that “An exchange of gunfire took place after Byrd fired at the officers. Keaira Byrd was killed as a result of the shooting and Lacy was severely injured.” Based upon a November 21, 2012 inspection by Dr. Smith’s investigator at the Greenwood Police Department, there is

no bullet casing recovered from the crime scene that could have come from the weapon that Keaira Byrd supposedly fired. The state has provided no evidence of any bullet casing from Keaira Byrd's weapon. William Acosta, a licensed private investigator who is retired from the New York City Police Department, reviewed the physical evidence provided by the Greenwood Police Department, including all bullet casings recovered from the crime scene. Based on Mr. Acosta's investigation and review, there are no bullet casings recovered from the crime scene that could have come from the weapon that Mr. Byrd supposedly fired. See "Affidavit of William Acosta", attached as Exhibit "D". Therefore, Detective Byars' claim on information and belief, under oath, that there was an exchange of gunfire after Keaira Byrd fired on the officers constitutes a false official statement by either Detective Byars or by an unknown and unsubstantiated source.

**No Evidence Provided to the Defense That Derrick Lacy Overheard  
Anything On A Speakerphone**

42. In the "Statement of Underlying Facts and Circumstances" (Exhibit "C"), Detective Byars states under oath that on information and belief during a conversation between Derrick Lacy and law enforcement officers, "...Lacy stated that he had overheard a phone conversation, on speakerphone, between Byrd and Smith, in which, Smith offered Byrd \$20,000.00 to kill Abraham." An agent of the Attorney General's Office drafted the "Statement of Underlying Facts and Circumstances". Based on Detective Jeff Byars' sworn testimony at the preliminary hearing, Defendant Jones assisted with the drafting of the "Statement of Underlying Facts and Circumstances." The Attorney General's Office and ADA Jones are both members of the judicial branch of government.

43. A true and correct copy of the transcript of the April 28, 2012 Greenwood Leflore Hospital interrogation of Derrick Lacy is attached and marked Exhibit "E".

44. The transcript of Derrick Lacy's statements at Greenwood Leflore Hospital is devoid of any claim by Derrick Lacy that he overheard a speakerphone conversation between Dr. Smith and Keaira Byrd. The claim under oath by Detective Byars on information and belief that Derrick Lacy overheard a conversation over a speakerphone between Keaira Byrd and Dr. Smith is a material falsehood.<sup>2</sup>

**Derrick Lacy's Alleged Statements Were Obtained After  
Mr. Lacy Asked for An Attorney**

45. The transcripts reveal that Derrick Lacy asked for an attorney as Mr. Lacy awaited transport by helicopter to the University Medical Center in Jackson: "I want my lawyer. I'm, I'm a talk when my lawyer around". See Exhibit "E" page 148.

46. In spite of Mr. Lacy's request for an attorney, and even in Mr. Lacy's serious and grave medical condition, law enforcement continued to press Mr. Lacy for information. The "Statement of Underlying Facts and Circumstances", dated April 29, 2012, even recounts that "Lacy is now in ICU at UMC and is unconscious and is expected to remain so for several days."

47. "The United States Supreme Court as well as our own supreme court, has made it clear that if the accused states that he wants an attorney, all interrogation must cease until his attorney is present." *Pannell v. State*, 7 So.3d 277, 282 (¶ 11)

(Miss.App.2008).

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<sup>2</sup> Importantly, Detective Jeff Byars makes no effort in the "Statement of Underlying Facts and Circumstances" to show that the purported Derrick Lacy statements had any indicia of reliability, as required by the Fourth Amendment.

48. Defendants Richardson and Jones are pursuing and continue to pursue a capital murder conviction against Dr. Smith based on supposed probable cause obtained unlawfully by law enforcement after Derrick Lacy asked for an attorney.

49. Law enforcement officers questioned Derrick Lacy and obtained alleged statements from Mr. Lacy in clear violation of the requirement of the Sixth Amendment that questioning cease when Derrick Lacy requested a lawyer.

50. Use of the "Statement of Underlying Facts and Circumstances" by the state, under color of state law, violates Dr. Smith's substantive due process rights, procedural due process rights, and his Fourth Amendment right to be free of unreasonable searches and seizures. In addition, because the alleged statements from Derrick Lacy were made after Mr. Lacy asked for an attorney, the state is using purported statements from Derrick Lacy in violation of the Sixth Amendment right to counsel.

51. The Defendants' unlawful use of the capital murder statute, the Defendants' clear violation of the separation of powers doctrine, and the Defendants' egregious deprivations of fundamental constitutional rights are such that there is a substantial likelihood that Dr. Smith will prevail on the merits in this Court.

**2. THERE IS A SUBSTANTIAL THREAT THAT DR. SMITH WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED**

52. The death penalty and life in prison are irreparable injuries that can only be remedied by this Court's grant of injunctive and declaratory relief.

53. The Defendants have steadfastly maintained that the Mississippi capital murder statute applies to the facts of this case, even though a plain reading of Miss. Code

§97-3-19(2)(e) shows that the killing of Keaira Byrd must have been "...by a person engaged in the crime of ....burglary...".

54. 42 U.S.C. §1983 provides a remedy of injunctive relief. "Where a statute expressly provides for injunctive relief, irreparable harm is presumed and need not be established." *United States v. McMillan*, 946 F.Supp. 1254, 1266 (N.D.Miss.1995) (internal citations omitted).

55. The history of this case, and the continuing and egregious conduct of the Defendants, shows that there is a substantial threat that Dr. Smith will suffer irreparable harm if the injunction is not granted.

56. The trial court's December 13, 2012 sua sponte move of the trial date back to February 4, 2012, without any party requesting such a move, and based only on notice from the trial court of a "rescheduling conference", supports the urgency and validity of Dr. Smith's request for injunctive relief. See again, Exhibit "A".<sup>3</sup>

**3. THE THREATENED INJURY OF THE DEATH PENALTY OR LIFE IN PRISON OUTWEIGHS ANY THREATENED HARM TO THE DEFENDANTS**

57. The threat of the death penalty or life in prison outweighs any possible harm to the Defendants.

58. The Defendants would suffer no harm if the Court were to grant the injunction. The injunction would enjoin the Defendants, in their official capacities, from pursuing an unlawful capital murder charge.

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<sup>3</sup> Again, the trial court noticed the "rescheduling conference" by email three (3) days after Dr. Smith filed his *Amended Complaint for Injunctive and Declaratory Relief* in this Court, in which Dr. Smith shows that the Attorney General conducted an unlawful police operation on April 28, 2012.

59. There is no harm that an injunction would impose on these Defendants. The Defendants cannot claim harm from the requested injunction because the injunction would enjoin these Defendants from unlawfully pursuing a capital murder charge under color of state law that is not supported by the facts or by the law.

**4. GRANTING THE PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST**

60. The preliminary injunction would serve the public interest because the federal courts have a strong public interest in protecting citizens from unlawful and illegal criminal prosecutions.

61. “The purpose of §1983 is to provide persons deprived of their constitutional rights by unlawful official actions with a remedy...”. *Douthit v. Jones*, 619 F.2d 527, 534 (5<sup>th</sup> Cir. 1980).

62. Granting the preliminary injunction serves the public interest by providing Dr. Smith with a remedy for the Defendants’ unlawful official actions under color of state law that deprive Dr. Smith of his rights under the Constitution of the United States.

**CONCLUSION**

The Defendants have been and continue to deprive Dr. Smith of fundamental constitutional rights under color of state law by pursuing an unlawful capital murder charge that has no basis in law or in fact. The Defendants have been and continue to deprive Dr. Smith of fundamental constitutional rights under color of state law by using an unlawful killing by the AG’s Investigator that occurred while the Attorney General’s Office was violating the separation of powers doctrine that has been in place for over 200 years.

Mississippi history is replete with occasions where the federal courts found it necessary to step in and provide a remedy when state officials, under color of state law, deprive citizens of fundamental rights guaranteed under the Constitution of the United States. This Court should enter a preliminary injunction enjoining the Defendants from pursuing the unlawful capital murder charge against Dr. Smith.

Respectfully submitted, this 17<sup>th</sup> day of December, 2012.

Ralph Arnold Smith, Jr.

By: /s/ William C. Bell  
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**Certificate of Service**

I, William C. Bell, attorney for Ralph Arnold Smith, Jr., do hereby certify that I have this day filed the foregoing *Motion for Preliminary Injunction* through the Court's electronic filing system, and effectuated service on the Defendants through their attorneys of record by filing the motion and the exhibits through the Court's electronic filing system.

This, the 17<sup>th</sup> day of December, 2012.

/s/ William C. Bell