

Cause Nos. 2011-CR-11074 & 2011-CR-11075

STATE OF TEXAS

§

IN DISTRICT COURT

V.

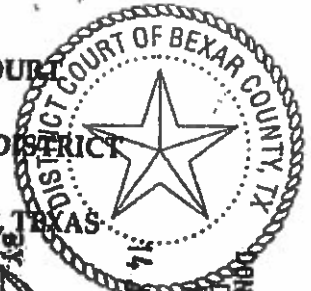
§

226<sup>TH</sup> JUDICIAL DISTRICT

TAYLOR RAE ROSENBUSCH

§

BEXAR COUNTY, TEXAS



MOTION FOR FINDING OF CONTEMPT

TO THE HONORABLE JUDGE DICK ALCALA:

— NOW COMES Susan D. Reed, Criminal District Attorney for Bexar County, Texas, and moves the Court to hold Michael W. McCrum in contempt of court. By this Motion, the State also gives Michael W. McCrum notice of the allegations of contemptuous conduct contained herein. In support this Motion, the State would show unto the Court the following:

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DORNA KAY HEKINNEY  
DISTRICT CLERK  
BEXAR COUNTY  
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BEXAR COUNTY

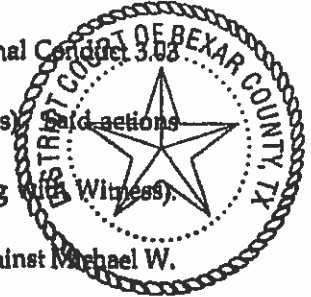
**INTRODUCTION**

The State has reason to believe and a duty to report<sup>1</sup> to this Court that Michael W. McCrum - lead counsel for the defense in the trial of this cause - obstructed this Court's fair and orderly administration of justice by engaging in conduct in violation of the Disciplinary Rules of Professional Conduct and the dignity of the Court. McCrum deliberately caused a subpoenaed witness, subject to recall by the express order of the Court, to absent herself from court and evade the State's attempts to contact and serve process on the witness. McCrum,

<sup>1</sup> See Tex. R. Prof. Conduct 8.03, which provides in relevant part:

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

when questioned by the Court, then misrepresented the subpoenaed status of the witness. These actions constitute violations of the Texas Disciplinary Rules of Professional Conduct 3.03 (Candor Toward the Tribunal) and 3.04 (Fairness in Adjudicatory Proceedings). Said actions also offend the spirit and possibly the letter of Penal Code § 36.05 (Tampering with a Witness). Such conduct merits a finding of contempt and an order of punitive sanction against Michael W. McCrum.



### STATEMENT OF THE FACTS

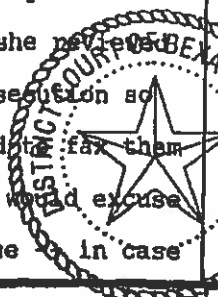
1. On October 14, 2013, the McCrum Law Office filed with the District Clerk an application for the issuance of a subpoena summoning Melanie Little to give testimony in the trial of this cause. (Defendant's Subpoena Application).<sup>2</sup><sup>3</sup> The subpoenas were issued and served on Ms. Little by electronic transmission at her place of work, the Starlite Recovery Center. (Defendant's Subpoena of Melanie Little).<sup>4</sup> No return of this subpoena was made to the Court.
2. On October 16, 2013, Ms. Little testified as a defense witness at the punishment phase of the trial in this cause. At the conclusion of her testimony, Assistant Criminal District Attorney Clayton Haden requested that Ms. Little not be excused until records were provided for the State to review and determine whether she would be recalled:

<sup>2</sup> Attached as Exhibit 2.

<sup>3</sup> The defendant's applications for issuance of subpoenas for Melanie Little appear to be signed by proxy with the purported permission of Michael McCrum.

<sup>4</sup> Attached as Exhibit 3.

20	MR. HADEN: Your Honor, I don't have anymore
21	questions. We would ask, though, that any records she reviewed
22	prior to her testimony today be provided to the prosecution so
23	that we can review them. And if she -- if they need to fax them
24	from Center Point or whatever, that's fine. And we would excuse
25	her, but we would like to look at the records in case in case
1	she needs to be recalled.



(Reporter's Record v.1, 47-48).

The Court told Ms. Little that she was "excused," but then recessed to consider the State's Rule 612 request for the production of records she reviewed prior to her testimony.

(Reporter's Record v.1, 48). When proceedings resumed, the Court expressly instructed Ms. Little that she was subject to being recalled by the State. (Reporter's Record v.1, 49-50).<sup>3</sup>

Parties and counsel for both sides were present for this ruling:

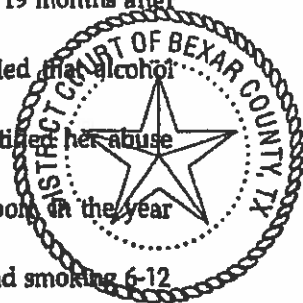
6	THE COURT: All right, we're outside the presence
7	of the jury. The witness testified that she used those records
8	to refresh her recollection. I think 612 entitles the State to
9	look at those documents, recall her as an adverse witness in
10	order to explore anything that might be in there.

(Reporter's Record v.1, 49-50).

3. On October 16, upon inspecting the records that night which the Court ordered Ms. Little to produce, the attorneys for the State learned (1) that defendant's testimony at trial had understated the true extent of her alcohol substance abuse prior to the incident, and (2) that

<sup>3</sup> Attached as Exhibit 4.

defendant continued to abuse alcohol and controlled substances for at least 19 months after the date of the offense. The records reflect Ms. Little would have testified that alcohol became a problem for the Defendant when she was 14 (the Defendant testified her abuse started a year before the crash when she was 18). Further, the records report in the year before the crash, the Defendant was ingesting 2 grams per day of cocaine and smoking 6-12 bowls a day of marijuana (both higher usages than she admitted to while testifying). Finally, based on the counseling records provided, Ms. Little would have testified that the Defendant continued to drink alcohol at least until April 2013, 19 months after the crash, and during this time, the Defendant was drinking alcohol *to the point of passing out* two times per week. The records further state the Defendant was also abusing Ambien (twice per week) and Loratab (taking 8-9 pills at a time) for at least 19 months after the crash. Based on this newly discovered information, attorneys for the State sought to recall Ms. Little to present these relevant and material facts to the jury.



4. On October 17, Ms. Little was contacted on her mobile telephone by Assistant Criminal District Attorney Eric Fuchs. Mr. Fuchs told Ms. Little that he was recalling her to court to provide additional testimony regarding defendant's alcohol and substance abuse. Mr. Fuchs requested that she return to court by 2:30 p.m. that same day, and Ms. Little agreed. (Sworn Statement of Melanie Little).<sup>6</sup>
5. Ms. Little then called the McCrum Law Office and spoke to an employee named Rose Garcia. According to Ms. Little:

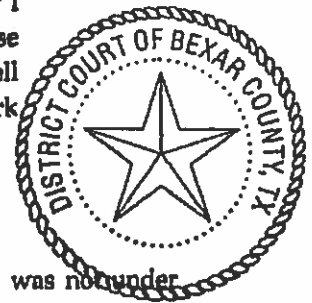
"[Rose] contacted [McCrum] and told me that if I was not

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<sup>6</sup> Attached as Exhibit 1.

subpoenaed that I did not have to appear in court. I told her I needed to call Eric back and tell him that I was not coming. Rose told me not to call. I asked her if he (Mike McCrum) could tell Eric that I was not coming because that was not the way I work and I had told him I was coming."

(Sworn Statement of Melanie Little).



6. McCrum then telephoned Ms. Little and misinformed Ms. Little that she was not under subpoena and would not violate the law by failing to appear in court. McCrum suggested that Ms. Little turn off her phone, refrain from checking her messages, and absent herself from the area. Ms. Little again expressed a desire to call Mr. Fuchs, but McCrum expressly instructed her not to do so. McCrum told Ms. Little that the "DA was out for blood, and those guys were being obsessive (to the effect that the state was more concerned about winning than justice) and wanted Taylor [the defendant] to be put away for a long time." (Statement of Melanie Little). In response to McCrum's pressure, Ms. Little absented herself from Court, turned off her mobile telephone, and drove her vehicle aimlessly to avoid contact by the prosecution.
7. Later in the day of October 17, around 2:30 p.m., attorneys for the State informed the Court that they had been unable to contact Ms. Little since Mr. Fuchs's conversation with her that morning. Mr. Fuchs informed the Court that Ms. Little's mobile number was not receiving calls and she was not at her place of work. Mr. Fuchs requested a postponement of the trial in order to locate Ms. Little. McCrum opposed the postponement with knowledge that his actions had caused Ms. Little's absence and unavailability. The Court then inquired whether Ms. Little was subject to subpoena, and McCrum falsely replied and misinformed the court that she was not:

13	THE COURT: Is the witness that you called	
14	obligated to be here by anyone's subpoena?	
15	MR. MICHAEL McCRUM: No, Your Honor.	
16	MR. FUCHS: Judge, just under the subject of the	
17	Court that she was ordered to be available for recall subject to	
18	her prior testimony once we received the records.	
19	MR. MICHAEL McCRUM: She's not under subpoena,	
20	Judge.	

(Reporter's Record v.2, 7).<sup>7</sup>

McCrum's misrepresentation went undetected by the Court and unrebutted by the State because he had not filed the return on the subpoena with the papers of the Court as was his duty under Article 24.04(b) of the Code of Criminal Procedure. As a result, neither the Court nor the State could know that Ms. Little was subject to a subpoena. The Court instructed the parties to return the next morning, October 18, at 9:00 a.m.

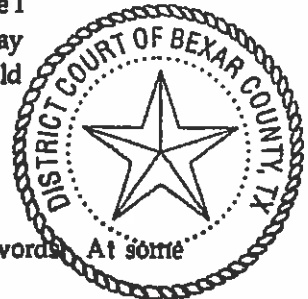
8. Later in evening of October 17, around 7:00 p.m., Ms. Little called her workplace and was informed by Shannon Malish that a subpoena commanding her presence in court had been served by the District Attorney's Office. (See State's Subpoena attached).<sup>8</sup> Upon learning this, Ms. Little again called McCrum and told him of the subpoena. McCrum told Ms. Little that the trial had been postponed until the next morning and that the District Attorney's Office was seeking her. McCrum advised her not to return home and to turn off her phone to avoid remote tracking. Specifically, Ms. Little states that McCrum advised her as follows:

<sup>7</sup> Attached as Exhibit 5.

<sup>8</sup> Attached as Exhibit 7.

"He [McCrum] said, I cannot tell you what to do but if it was me I would turn my phone off because they can track it and stay away from the last place you used it. He said if it were him, he would not go home and for me to find a place to stay for the night."

(Sworn Statement of Melanie Little at 2).<sup>9</sup>



Ms. Little states that she was placed in fear by McCrum's intimidating words. At some point, Ms. Little overcame her fear and decided to return to Court the next morning. She informed her husband of this, and he was supportive of the decision. (Sworn Statement of Melanie Little).

9. On the morning of October 18 – the last day of trial – Melanie Little arrived at the District Attorney's Office and informed the prosecutors of the circumstances of her failing to appear in court and the role McCrum had played in her absence and evasion. When the trial resumed at 9:00 a.m., Mr. Fuchs moved the Court to reopen the evidence in the case and allow brief additional testimony from Ms. Little. (Reporter's Record v.3, 3).<sup>10</sup> McCrum vehemently opposed reopening the evidence. With full knowledge of his own actions causing Ms. Little to be absent and unavailable, McCrum placed blame on the State:

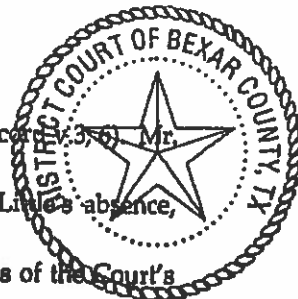
14	MR. MICHAEL McCRUM: We have several things, Judge,
15	in response to that. Number one is that if they wanted her to
16	testify before the close of evidence, they should have subpoenaed
17	her and called her before noon yesterday: They waited until noon
18	to call her. They didn't call her Wednesday night when they saw
19	those documents, they had her cell number. They didn't call her.
20	And so we've now closed the evidence.

<sup>9</sup> Melanie's account of these events is corroborated by the sworn statement of her co-worker, Shannon Malish, attached as Exhibit 8.

<sup>10</sup> Attached as Exhibit 6.

(Reporter's Record v.3, 4).

The Court denied the State's motion to reopen the evidence. (Reporter's Record v.3, 5). Mr. Fuchs, then attempted to inform the Court of the circumstances of Ms. Little's absence, including McCrum's involvement; McCrum interjected, arguing "[t]he basis of the Court's ruling is on the failure of the district attorney's office to do its job. Ms. Little's decisions yesterday have no bearing, no relationship to that." (Reporter's Record v.3, 9). Closing argument then proceeded and the case was submitted to the jury's deliberation.



## THE LAW OF CONTEMPT

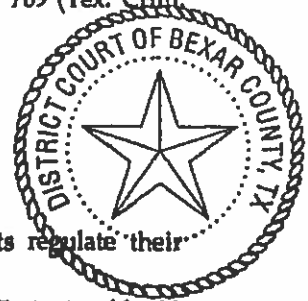
### 1. The Court's Contempt Powers

It is the duty of the courts of the State of Texas to "require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done." Tex. Gov't Code § 21.001(b). To fulfill this duty, courts are invested with punitive and coercive powers including the common law and statutory power to hold in contempt those who act in contravention to a court's orderly administration of justice.<sup>11</sup> "The court's authority to regulate trials, and accordingly, to punish for contempt, is broad and plenary." *Ex Parte Jacobs*, 664 S.W.2d 360, 363 (Tex. Crim. App. 1984). "[C]ontempt power is accorded wide latitude because it is essential to judicial independence and authority." *Ex Parte Daniels*, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987). "Contempt power is a necessary and

<sup>11</sup> Tex. Gov't Code § 21.002 ("Contempt") provides the statutory basis of a court's contempt power which is derived from the ancient common law power of courts to regulate their proceedings and enforce their orders. See *Ex Parte Arnold*, 503 S.W.2d 529, 531 (Tex. Crim. App. 1977).



integral component of judicial authority." *Ex Parte Daniels*, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987).



## 2. The Nature of Contempt

There is no statute that defines contempt in Texas. Instead, courts regulate their proceedings by the doctrine of contempt developed at common law. See *Ex Parte Arnold*, 503 S.W.2d 529, 531 (Tex. Crim. App. 1974). "The essence of 'contempt' is that the conduct obstructs or tends to obstruct the proper administration of justice." *Ex Parte Jacobs*, 664 S.W.2d 360, 363 (Tex. Crim. App. 1984). In addition to obstructive acts, "acts disrespectful of the court" are also punishable by contempt. *Ex Parte Krupps*, 712 S.W.2d 144, 149 (Tex. Crim. App. 1986).

Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during a litigation, or otherwise tends to impede, embarrass, or obstruct the court in discharge of its duties is guilty of contempt.

*Ex Parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

## 3. Direct vs. Constructive Contempt

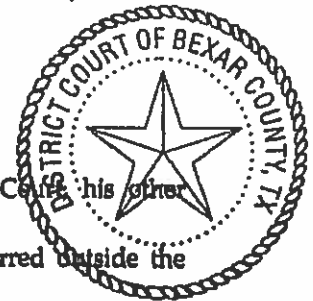
There are two general classes of contemptuous actions: *direct* and *constructive*. Essentially, direct contempt occurs in the presence of the court while constructive contempt occurs outside its presence. As the Texas Supreme Court has explained:

In the one [direct contempt] the court sees and knows of all the acts which constitute the contempt, and needs no testimony to establish their existence as facts, while in the other [constructive contempt], testimony must be heard to inform the court, and, this being so, due process of law demands that this testimony should be heard publicly, in open court, and by both sides to the

controversy, after due notice to the accused of what is alleged against him, in order that he may have an opportunity to meet and explain it.

*Ex Parte Ratliff*, 3 S.W.2d 406 (Tex. 1928).

Although McCrum made his misrepresentation to the face of the Court, his other contemptuous conduct and the factual basis giving rise to his deceit occurred outside the Court's presence. Consequently, this matter should be regarded as a case of constructive contempt, and this Court should hold a hearing whereat the State may present evidence and McCrum may answer these allegations.



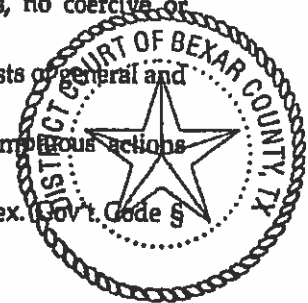
#### 4. Sanctions for Contemptuous Conduct

The sanctions to be assessed upon a finding of contempt conduct are generally classified as *civil* or *criminal*, depending on the purpose of the sanction. See *In re Reese*, 341 S.W.3d 360, 366 (Tex. 2011). Civil contempt sanctions are remedial and coercive in nature. The imposition of such sanctions is conditioned upon the contemnor's compliance with an order of the court. Criminal contempt sanctions are punitive in nature – "the contemnor is being punished for some completed act which affronted the dignity and authority of the court." *Ex Parte Werblaud*, 536 S.W.2d 542, 545 (Tex. 1976).

Criminal contempt before a district court is punishable by "a fine of not more that \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail." Tex. Gov't Code § 21.002(b).

In this case, McCrum was successful in his efforts to exclude adverse testimony from the jury's consideration and prevent the Court from reopening the evidence at trial. The jury's

verdict and the judgment of the Court may not now be disturbed. Thus, no coercive or corrective remedy for McCrum's conduct is appropriate. Instead, in the interests of general and specific deterrence of similar future attorney misconduct, McCrum's contemptuous actions merit the assessment of a punitive sanction within the range provided by Tex. Gov't Code § 21.002(b).



### ARGUMENT AND AUTHORITIES

The conduct of Michael McCrum described above constituted a calculated, deliberate, and ultimately successful effort to conceal highly probative evidence from the Court and jury. McCrum created, enhanced, and preyed upon a witness's anxieties, loyalties, and fear to cause her to absent herself from court and evade the legal process. Having done this, McCrum then misrepresented Ms. Little's subpoenaed status to the Court and – in bad faith – opposed the reopening of evidence. These actions offend the laws of the State of Texas, the Disciplinary Rules governing the conduct of lawyers, and the fair administration of justice by the Court.

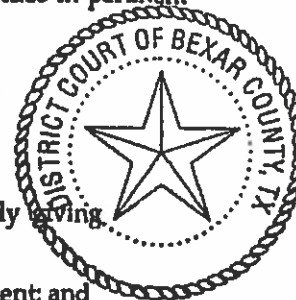
1. In causing Melanie Little to absent herself from court and avoid service of process, Michael McCrum violated Disciplinary Rule of Professional Conduct 3.04 (Fairness in Adjudicatory Proceedings).

Disciplinary Rule of Professional Conduct 3.04 – governing “Fairness in Adjudicatory Proceedings” – sets forth the basic duties of ethical behavior owed a lawyer engaging in an adjudicatory proceeding. Violations of Rule 3.04 affect the fundamental fairness of our adversarial system. Rule 3.04(a) prohibits an attorney from obstructing another party's access to evidence, and Rule 3.04(e) proscribes an attorney's asking or encouraging a witness, who is

not associated with his client, not to speak to another party. Rule 3.04 provides in pertinent part:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence;
- (e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.



Tex. R. Prof. Conduct 3.04.<sup>12</sup>

By instructing Melanie Little to not contact Mr. Fuchs – a representative of the State of Texas – and avoid Mr. Fuchs's attempts to contact her, McCrum violated the clear mandate of Rule 3.04. By means of these unethical actions, McCrum intentionally and contemptuously frustrated the fair and orderly administration of justice by this Court.

2. In misrepresenting the subpoena status of Melanie Little to the Court, Michael McCrum violated Disciplinary Rule of Professional Conduct 3.03 (Candor Toward the Tribunal).

Disciplinary Rule of Professional Conduct 3.03 – governing "Candor Toward the Tribunal" – codifies the fundamental ethical dictate that a lawyer must be truthful and forthcoming before the courts. The rule requires that an advocate be both honest in statements made to the court and forthcoming with disclosures necessary to avoid the perpetration of fraud. The rule reads in pertinent part:

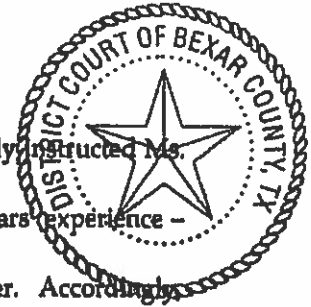
- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid

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<sup>12</sup> Attached as Exhibit 10.

assisting a criminal or fraudulent act;

Tex. R. Prof. Conduct 3.03.<sup>13</sup>



The record reflects that McCrum was present when the Court expressly instructed Ms. Little that she was subject to recall, and McCrum – an attorney of some 27 years' experience – was well aware that Ms. Little remained subject to his initial subpoena to her. Accordingly, when McCrum twice misinformed the Court that Ms. Little was not under subpoena, he misled the Court with knowing and calculated deceit. Because the defense failed to file a return of the subpoena served on Ms. Little, the Court and State could not at that time have known of McCrum's deception.

Additionally, Rule 3.03(a)(2) imposed a duty on McCrum to disclose the true circumstances under which Melanie Little failed to appear in court. Despite having ample opportunity to make a truthful disclosure of his conversations with Melanie Little, McCrum failed to do so. Instead, McCrum responded by maligning the competence of the prosecutors in the case.

By these unethical misrepresentations and omissions, McCrum intentionally and contemptuously frustrated the fair and orderly administration of justice by this Court.

3. In causing Melanie Little to absent herself from court and avoid service of process, Michael McCrum offended the principles underlying Penal Code § 36.05 (Tampering with Witness).

Michael McCrum intentionally caused Melanie Little to withhold testimony, elude legal process, and absent herself from trial upon the coercive threat of exposure to hatred, contempt

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<sup>13</sup> Attached as Exhibit 9.

and ridicule. If McCrum's actions were not a direct violation of Penal Code § 36.05 (Tampering with Witness), they certainly offend the principles of justice and witness integrity underlying the statute. Penal Code § 36.05 provides in pertinent part:

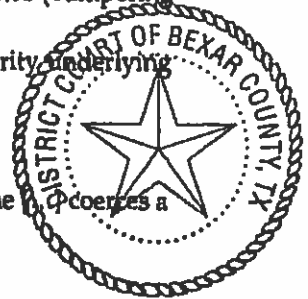
(a) A person commits an offense if, with intent to influence the witness, he coerces a witness or prospective witness in an official proceeding:

- ...
- (2) to withhold any testimony, information, document, or thing;
- (3) to elude legal process summoning him to testify or supply evidence;
- (4) to absent himself from an official proceeding to which he has been legally summoned;

"Coercion" is defined by Penal Code § 1.07(9), and includes "a threat, however communicated ... to expose a person to hatred, contempt, or ridicule."

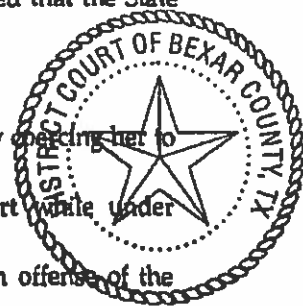
Michael McCrum recognized that additional testimony from Ms. Little regarding defendant's alcohol and substance abuse would be material to the jury's verdict and detrimental to his client, so he engaged in a scheme and course of conduct intended to influence Ms. Little to withhold her testimony, elude the additional subpoena the State was attempting to serve upon her, and ultimately absent herself from the trial.

McCrum accomplished this coercion placing Ms. Little in fear of hatred, contempt, and ridicule. As Ms. Little states: "McCrum said that the DA wanted to use the information in the documents to further discredit me and Taylor [the defendant] and put her away for a long time and make Taylor a monster." And, "the DA was out for blood, and those guys were being obsessive (to the effect the state was more concerned about winning than justice) and wanted Taylor to be put away for a long time." By these and other statements, McCrum intentionally placed Ms. Little in fear of contempt and hatred by the defendant and society at large if she



appeared in court to give additional testimony. Moreover, McCrum threatened that the State would expose her to ridicule by "discrediting" her in open court.

McCrum acted with the intent to influence the witness Melanie Little by ~~coaxing her to~~ withhold her testimony, elude legal process, and absent herself from court ~~while under~~ subpoena and subject to recall. By means of these actions, McCrum acted in offense of the values and principles underlying the Texas Witness Tampering statute and in contempt of this Court.

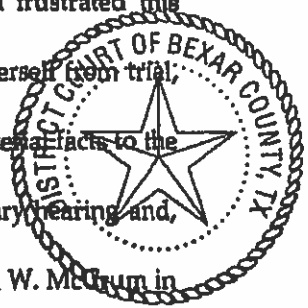


**4. The conduct of Michael McCrum deliberately frustrated the Court's fair and orderly administration of justice.**

Beyond the specified legal and ethical violations described above, Michael McCrum's conduct in causing a witness to disappear before she could offer additional probative testimony to the jury offends the dignity of this Court and the legal profession on whole. It is the duty of this Court to "require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done." Tex. Gov't Code § 21.001(b). McCrum acted with deliberate intent to frustrate the Court's pursuit of this duty, and his actions were ultimately successful. The jury was not given the opportunity to hear the relevant and highly probative testimony that Melanie Little could have offered. Such contemptuous actions offend the basic principles of candor and fair-conduct that underlie our adversarial justice system.


**CONCLUSION AND PRAYER**

Michael W. McCrum violated the Rules of Professional Conduct and frustrated this Court's orderly administration of justice when he caused a witness to absent herself from trial, instructed the witness to evade service of process, and then misrepresented material facts to the Court. Accordingly, the State prays this Court set this matter for an evidentiary hearing and, after due consideration of the evidence and arguments presented, hold Michael W. McCrum in contempt and assess an appropriate punitive sanction.



Respectfully submitted,

Susan D. Reed  
Criminal District Attorney  
Bexar County, Texas

By:   
S. Patrick Ballantyne  
Assistant Criminal District Attorney  
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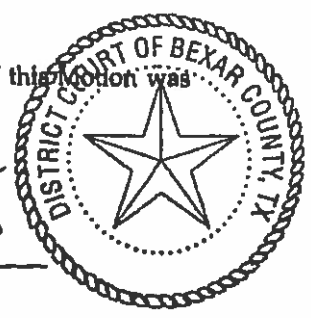


**CERTIFICATE OF SERVICE**

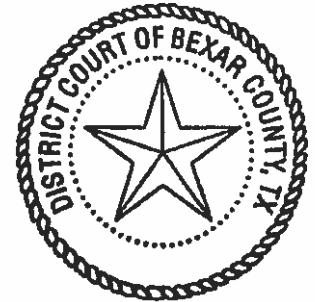
I, S. Patrick Ballantyne, hereby certify that a true and correct copy of this Motion was hand delivered this 7<sup>th</sup> day of January, 2014, to Michael McCrum.:

*S. Patrick Ballantyne*

S. Patrick Ballantyne



CERTIFIED COPY CERTIFICATE STATE OF TEXAS  
I, DONNA KAY MCKINNEY, BEXAR COUNTY DISTRICT  
CLERK, CERTIFY THAT THE FOREGOING IS A TRUE  
AND CORRECT COPY OF THE ORIGINAL RECORD AS  
INDICATED BY THE VOLUME, PAGE AND COURT ON  
SAID DOCUMENT. WITNESSED MY OFFICIAL HAND  
AND SEAL OF OFFICE ON THIS:



*March 04, 2014*

**DONNA KAY MCKINNEY  
BEXAR COUNTY, TEXAS**

By: *Cynthia Gomez*  
Cynthia Gomez, Deputy District Clerk  
(NOT VALID WITHOUT THE CLERK'S ORIGINAL SIGNATURE.)