

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

IN THE MATTER OF THE
STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

SUPREME COURT OF NEW MEXICO
FILED

JUN - 4 2012

State of New Mexico
Plaintiff,



v.

Michael Murphy,
Defendant.

Docket # CR-2011-560
Docket # CR-2011-1046
Judge Leslie C. Smith

**Petition for Writ of Prohibition and Superintending Control
and Request for Stay**

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State v. Rael, 117 N.M. 539, 873 P. 2d 285 (NMCA 1994)

State v. McDonald, 126 N.M. 44, 966 P. 2d 752 (NMSC 1998)

State v. Mills, 94 N.M. 17, 606 P. 2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P. 2d 545 (1980)

FEDERAL CASES:

United States v. Sullivan, 919 F. 2d 1403, 1416 (10th Cir. 1990), cert. denied, --- U.S. ---, 113 S. Ct. 285, 121 L. Ed. 2d 211 (1992), and cert. denied, --- U.S. ---, 113 S. Ct. 1013, 122 L. Ed. 2d 161 [117 N.M. 543] (1993)

U.S. v. Landron-Class, 714 F. Supp. 2d 278 (US Dist. Ct., D. Puerto Rico 2010)

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Judge Leslie C. Smith

**Petition for Writ of Prohibition and Superintending Control
and Request for Stay**

COMES NOW the State of New Mexico, (hereinafter "Applicant") and hereby moves this Honorable Court for a Writ of Prohibition and for Superintending Control and Request for Stay. As grounds therefore, Applicant states as follows:

Introduction and Statement of Facts:

This matter generally relates to the discovery Order issued by Judge Smith on May 23, 2012 to Lisa Schultz, (hereinafter referred to as WITNESS), requiring her to produce approximately five years (i.e. four years and nine months) of "any medications prescribed for her by a physician". As this judicial action is improper, and the context in which it occurs is vital for an understanding of the matter, the

Applicant will begin with the one-year procedural history to which WITNESS has been subjected in this case.

1) On April 8, 2011, Defendant's attorney (Mr. Michael Stout) emailed WITNESS and requested that she contact him. In this April 8th email Mr. Stout himself was very clear as to the fact that the law did not require her to meet with him. As he said in his email "Of course, you are not obligated to speak with me about any subject, but, likewise, you can if you wish." See "Unfiltered message" from Mr. Michael Stout to the WITNESS, dated April 8, 2011, attached hereto as **Exhibit 1**, and made a part hereof by reference. Believing that this was a correct statement of the law, i.e. no obligation exists for a witness to speak prior to an indictment being issued to a Target's attorney, she did not do so at that time.

2) On May 4, 2011, WITNESS received a call on her private cell phone from Mr. Stout, essentially requesting an opportunity to interview her concerning "Judge Murphy". According to WITNESS, Mr. Stout appeared to have another attorney on the phone call. WITNESS advised the State that she felt pressured and intimidated that Mr. Stout called her on her private cell, during her vacation, and apparently had at least one other attorney on the line. She declined to meet with him.

3) On the afternoon of May 5, 2011, the Chief Judge of the Third Judicial District Court, Judge Driggers, who is also a witness in this case, personally approached WITNESS to address the "issue" concerning her submitting to an interview with Mr. Stout. Chief Judge Driggers indicated that Judge Robinson, who presided over the matter at the time, asked him to approach her to "explain" to her the obligation to provide a witness interview to the Defense. Chief Judge Driggers further indicated

that Judge Robinson would not hesitate to issue an order against another person to provide such an interview. However, Chief Judge Driggers told WITNESS that Judge Robinson had contacted Chief Judge Driggers to convey a message that as a courtesy to a fellow judge, was being asked to comply prior to the issuance of any action against her. WITNESS was informed that an immediate answer was required in ten minutes. Chief Judge Driggers then left the chambers of WITNESS.

4) Judge Robinson acknowledged this extra-judicial contact in his order of May 6, stating: "This Court asked Chief Judge Driggers to speak with Judge Schultz to explain she had a duty to discuss her testimony with the defense. Judge Driggers called the Court yesterday evening to advise he had spoken to Judge Schultz about her duty. However, Judge Schultz advised Chief Judge Driggers she would not speak to Mr. Stout." See **Exhibit 2**, page 2, ¶ 6.

5) WITNESS did not state that she "would not speak to Mr. Stout". In fact, she explained that Mr. Stout had called her on her private cell the previous day, and she felt "very pressured and intimidated". She also said she had "real concerns about the legality of what Mr. Stout is doing".

6) Nonetheless, Mr. Stout, knowing and admitting in his April 8th email that the law did not require her to give a witness interview pre-grand jury, went to Judge Robinson and complained: "Judge Lisa Schultz [has] told him she could not speak to him regarding the grand jury investigation". See **Exhibit 2**, page 1, ¶ 1. Brackets added.

7) On May 6, 2011, Judge Robinsons filed his Order requiring WITNESS to give a pre-indictment interview to Mr. Stout, without any legal authority.

- 8) On May 9, 2011, WITNESS filed a Writ of Prohibition & Superintending Control with this Court, requesting that Judge Robinson's Order be quashed.
- 9) On May 10, 2011, this Court granted the Writ request.
- 10) On June 27, 2011, WITNESS received her first "Notice of Statement" and "Subpoena Duces Tecum" from the Defendant.
- 11) On July 5, 2011, Judge Smith granted the State's "Motion to Quash" this Notice and Subpoena.
- 12) From July 6, 2011 until August 30, 2011, Judge Schultz received eight more Notices of Statements, Subpoenas and/or Motions to Compel information (including an "Addendum" to a Motion to Compel) from the Defendant.
- 13) In addition, during this time frame, the Defendant submitted two "partial transcripts" of the witness' interviews, requiring the provision of additional responses. [On July 18, 2011, the undersigned received a "Topics of Privilege Claim" from Defense Counsel. It contained three pages of "partial transcript" to which the Defendant objected - out of a total of approximately four hours of questioning on July 12, 2011. Further, on July 25, 2011, the undersigned received a second partial transcript from Defense Counsel. It contained two and 1/2 pages of "partial transcript" to which the Defendant objected - out of a total of approximately another six and 1/2 hours of questioning on July 19, 2011.]
- 14) In other words, during an approximately eight-week period, the Defendant demanded immediate provision of discovery in the form of at least eleven (11) different documents (repeatedly requesting essentially the same information).

15) As addressed in prior pleadings below, the pattern continued of the Defendant requesting this information in violation of the WITNESS' due process rights.

16) Specifically, e.g., on July 15, 2011 (during this eight week time period), Mr. Stout sought and obtained his second improper "ex-parte" order against WITNESS. Additionally, on July 15, 2011, WITNESS was served a fourth time with a Notice of Continuation of Statement and Subpoena for July 19, 2011 from 9:00 a.m. until 12:00 a.m. to resume at approximately 3:00 p.m. "until completed". Again, WITNESS was not provided with the required five days notice. Again, Defense counsel demanded unlimited access WITNESS.

17) Further, on July 15, 2011, at the time of service, Defense Counsel's staff incorrectly informed WITNESS that the Supreme Court had issued an Order requiring her to turn over all of the Judicial Standards' material. WITNESS responded that she had not seen, or heard, of any such order. Mr. Stout's personnel said she would drop it off at the courthouse. She also indicated that the Supreme Court's order was the reason for the new language in the Subpoena, and she pointed to the following language: "you are hereby commanded to produce the following documents: Any and all documents concerning Judicial Standards complaint(s) filed against you, to include but not limited to, documents related to the complaint(s) against you and your response(s) to the complaint(s)."

18) In short, Mr. Stout consistently violated the due process rights of WITNESS, e.g. providing less than the required time to respond and demanding seemingly unlimited access to "interview" time.

19) Yet in spite of Defendant's approach, WITNESS submitted to the interviews, responded to all pleadings and continued to provide any information not privileged or confidential. This is a significant point, as Defendant's documents required a wide-ranging and thorough search for a large quantity of material.

20) By July 21, 2011, WITNESS filed her first "Motion for Protective Order" from the Mr. Stout's abuse of process.

21) On September 8, 2011, the Court denied certain parts of the Defendant's requests, and ordered that the remaining information be submitted for an "In Camera" review no later than September 15, 2011. Judge Smith concluded by issuing a "protective order". He stated that:

"With respect to the motion for protective order: it is ordered that the statement for September 19, 2011 will be the **final** statement of Judge Schultz taken by Defendant, barring additional indictments or other unforeseen circumstances. No further subpoenas or subpoenas duces tecum of Judge Schultz will be permitted before trial except as aforesaid." See **Exhibit 3**, emphasis added in bold print.

22) Defendant filed another two Motions to Compel and for Production against WITNESS on September 14, 2011 and September 19, 2011 respectively -- bringing his total discovery pleadings (and/or demands) for essentially the same information to **thirteen (13)**.

23) WITNESS submitted a box containing the remaining items and documents to the Court for its private review on September 15, 2011.

24) On September 19, 2011, Mr. Stout questioned WITNESS for the fourth (4th) time (i.e. Mr. Stout has now questioned Judge Schultz for approximately **eighteen** plus hours). During this interview, Mr. Stout asked for the first time if WITNESS was

"on" certain medication(s)? Specifically, e.g., Mr. Stout stated: " ... today, are you on any kind of antidepressants...?" The State objected and WITNESS invoked her right to confidentiality pursuant to the Federal HIPPA law.

25) During the hearing immediately following the statement, Mr. Stout complained about this answer. He stated that he had asked WITNESS about her medical issues, because she had surgery (in 2008), with medical leave. [See partial Certified Transcript attached hereto as **Exhibit 4**, page 29, lines 12 through 18, and made a part hereof by reference.]

Mr. Stout then stated: "So I was asking her, I think appropriately, what kind of drugs was she under in prescription form." Id. at line 19 through 21.

26) Shortly thereafter, Judge Smith raised a hypothetical concerning drug abuse. The following dialog is a partial excerpt from the hearing:

Judge Smith: "Let's assume -- bear with me. Again, I always reduce things to the absurd to make sure it makes sense. So, yes, back in 2005, or whenever all this started, I don't remember, I was a heroin addict. So that would be relevant. I think the jury would want to probably know that, don't you think?"

Mr. Chandler: "Well, it has to have some relevancy to the" --

Judge Smith: "Because when you're an addict, you don't remember anything. Everything is kind of fuzzy. You know, I don't know anything."

Mr. Chandler: "She's not alleging or claiming anything happened while she was out on surgery or out on medical leave, or anything like that. All of this happened prior to her even having this" -- [See partial Certified Transcript attached hereto as **Exhibit 5**, page 30, line 13 through page 31, line 4.]

27) Despite the State's attempts to point out the irrelevancy of any prescription drug list, and the fact that no party has any evidence or allegation of memory loss of

WITNESS, Judge Smith ruled that it was relevant. Specifically, the following is a partial excerpt from the hearing:

Mr. Chandler: "And, your Honor, that would be like, for example, saying that if when he's saying he's in this liquor store robbery, if I got robbed in 2007, what does it matter if I took -- if I had surgery..."

Judge Smith: "**I don't care what it matters.** She can answer that. She can list them out. It may take her awhile because she may not be able to think of all of them off the top of her head. But she's going to be able to get the prescription information and give him the list of the drugs. That's pretty simple...." [See partial Certified Transcript attached hereto as **Exhibit 6**, page 32, line 24 through page 33, line 10. Bolding added.]

....

Judge Smith: "...I'm ruling that it could be relevant, Judge." [See partial Certified Transcript attached hereto as **Exhibit 7**, page 33, line 25.]

28) WITNESS asserted her Federal HIPPA rights, and asked: "because I am disabled and because I had a foot surgery, now my medications are going to be disclosed?" [See partial Certified Transcript attached hereto as **Exhibit 8**, page 34, lines 9 through 13.] Judge Smith then altered his order to an In Camera review, (as opposed to disclosure directly to the Defense). [Id., page 34, line 14 through 15.]

29) After brief discussion, Judge Smith announced his order, indicating that if WITNESS didn't like this ruling, then she should "writ it":

Judge Smith: "2007 until now. It's the list of prescription drugs, and it comes to me. And if she doesn't want to do it, that's okay. It will have consequences in the case.... And if she also -- if the Judge doesn't like the ruling, writ it. It's simple. That's why there's a Supreme Court." [See partial Certified Transcript attached hereto as **Exhibit 9**, page 35, lines 10 through 16. Also, c.f. page 33, lines 11-13, and page 34, lines 23-25. Id., Parenthetical material added, and material deleted as reflected by the ellipses.]

30) Later, WITNESS, without success, asked Judge Smith if: "it's not sufficient for you to put me under oath and ask me whether or not I'm an addict, or intoxicated, or

anything like that? That's not sufficient?" [See partial Certified Transcript, page 47, lines 19 through 22, attached hereto as **Exhibit 10**, and made a part hereof by reference.]

This offer was not sufficient.

31) On December 7, 2011, WITNESS provided a letter to Judge Smith inquiring as to the status of a written order concerning the prescription drug list, stating:

"I am writing this letter to request an order concerning the production of a prescription drug list. Specifically, I have not received a filed, written order concerning the production of the last four years of prescriptions drugs.

I do not know if the Court has, sua sponte, reconsidered its' verbal decision, or if an Order was filed that I did not receive. If an order has been filed, I would very much appreciate receiving a copy of it. If one has not been filed, then I am hereby requesting the issuance of a written Order so that I may determine the exact parameters of the Court's directions. This will enable me to assess my obligations, if any, and thereafter, determine my response.

If you have any questions concerning this request, please do not hesitate to contact the parties, and myself."

32) On or about December 8, 2011, the Court issued production of materials resulting from its "In Camera" review. From a significant box of materials, this court found that twenty-five pages of one document, i.e. the witness' journal, were not covered by "attorney-client" privilege, etc. It should also be noted that the Court had heavily redacted these pages. [The only other material that was disclosed consisted of certain footnotes (attachments) to this journal, presumably two brief recordings of Mr. Stout, and a 3 and 1/2 minute portion of a third recording.]

33) On December 12, 2011, the Defendant filed his "Motion to Release Certain Materials For Context and to Preserve Materials Not Produced." This pleading

essentially requested that the Court reconsider its' In Camera review, and issue production of additional documents.

34) On December 14, 2011, Judge Smith issued an email via his assistant, stating:

“re: medical information: Judge received a letter from Judge Schultz asking that the medication order be reduced to writing. Since the ruling was from the bench and verbal and since no order has been prepared and approved by all counsel and the witness, no order has been entered. No such order will be approved unless it tracks the language at the hearing and is submitted with a partial transcript OR is approved by all counsel and the witness.”

35) On or about January 13, 2012, WITNESS filed her “Response to Defendant’s Motion to Release Certain Materials For Context and to Preserve Materials Not Produced”.

36) On January 30, 2012, Judge Smith issued his Order denying Defendant’s request for further production of documents.

37) On Thursday May 10, 2012, Mr. Stout emailed Judge Smith, submitting a proposed Order concerning the list of prescription drugs. In other words, Defense counsel waited approximately eight months to launch this demand for an Order that he was required to complete. Further, Mr. Stout’s May 10, 2012 email to Judge Smith contained a devious proposed order, and a partial transcript. For example, the submissions do not contain the court’s September 19, 2011 verbal order that the drug list be submitted “In Camera”.

38) On May 22, 2012, the Applicant (State of New Mexico) filed a “Motion for Reconsideration of Court’s Verbal Order of Production of Witness’ Prescription Medication(s) For Almost Five Years”. See Motion for Reconsideration attached hereto as **Exhibit 11**.

39) On May 23, 2012, Judge Smith filed an "Order Re: Disclosure of Information by Witness. Lisa Schultz", referencing his oral order from September 19, 2011, which orders WITNESS to prepare a list of any medications prescribed for her by a physician from January 1, 2007 through September 19, 2011 for an In Camera review on or before June 5, 2012. The Court then explains that it will determine what, if any, information from the list will be revealed, and failure to submit a list will result in WITNESS being barred from testifying at trial. See Order attached hereto as **Exhibit 12**.

40) On June 4, 2012, Judge Smith emailed an Order denying State's Motion for Reconsideration on Court's Verbal Order of Production of Witness's Prescription Medication(s) for Almost Five Years, which was to be filed on the same date. In this Order the Court states that it is aware that there are certain prescription medications, for example benzodiazepines, with side effects of which may include forgetfulness or memory loss. The Court further states that it will be looking for these types of medications, despite no questions or allegations by either party of this prescription or any memory loss of WITNESS. So, with all due respect, the Court is now acting as an expert in pharmaceuticals by independently reviewing what medications he believes can cause memory loss of WITNESS, assuming she actually took any such medications over the timeframe set out by the Court. See **Exhibit 13**.

41) The Applicant is unaware of any law in New Mexico that supports an Order for Production in a Criminal case of a witness's prescriptions, nor has Mr. Stout or the Court cited any law that supports Defendant's oral request or the Court's Order.

42) Respectfully, the Applicant interprets the law differently than Judge Smith, and is in need of immediate guidance from the Supreme Court concerning this matter.

43) The question raised by this writ pertains solely to production of Prescription Drug Lists and to no other matters.

The Orders, issued by Judge Smith, dated May 22 and June 4 2012, appears to lack any legal authority.

- 1) Defense presented no case law in support of his request for this information.
- 2) No evidence was presented that WITNESS was, or is, in any manner lacking in memory, judgment, or competency.
- 3) No argument was presented that such information would be relevant, or reasonably calculated to lead to the discovery of admissible evidence, as required by the Rules of Criminal Procedure. See e.g. Rule 5-503 (C).
- 4) The State has not called into question the physical, or mental, status of WITNESS.
- 5) The physical, or mental, state of mind, and/or status of WITNESS, is neither an element of the offense(s) with which the Defendant is charged, nor an element of the defenses to those charge(s). Consequently, any information concerning this topic is non-discoverable pursuant to the rules of discovery, and the case law in New Mexico.
- 6) The charge of Bribery, e.g., in Docket CR-2011-1046, is not based in any form or fashion on the memory of WITNESS. In fact, it is based entirely on a tape recording of the Defendant's own conversation with WITNESS. As such, not even a

“red herring” argument concerning WITNESS’ memory or judgment can be interposed by the Defense.

7) The case law in New Mexico does not support this order for production of prescription drug information of a witness. In fact, it does not even support a request for testimony concerning a witness’ illegal use of drugs, let alone prescription medication. First, the cases refer to such issues as a witness’ prior drug addiction (to heroin), illegal drug trafficking/drug dealing, smoking a marijuana cigarette, etc. -- not to orders for prescription medication. See respectively, e.g., State v. Blea, 101 N.M. 323, 681 P. 2d 1100 (NMSC 1984) (hereinafter referred to as “Blea”), State v. Rael, 117 N.M. 539, 873 P. 2d 285 (NMCA 1994) (hereinafter referred to as “Rael”), and State v. McDonald, 126 N.M. 44, 966 P. 2d 752 (NMSC 1998) (hereinafter referred to as “McDonald”).

8) Secondly, these cases uniformly hold that even this information is not admissible.

Specifically, e.g., the New Mexico Supreme Court in “Blea” upheld a decision that Defendant’s proposed cross-examination of a State’s witness on her prior drug addiction was inadmissible. See “Blea” at pages 326 - 327. If a witness’ prior drug addiction to heroin is inadmissible, how, exactly, is a list of prescription medication relevant, or reasonably calculated to lead to the discovery of admissible evidence?

9) Of course, the case law does not allow the Defendant’s history of illegal drug information (e.g. drug dealing) at trial. As the Court of Appeals stated in “Rael”:

“The danger of unfair prejudice from admission of the drug-related evidence, by contrast, was great.... Evidence that even a witness had been involved with drugs has been held to be properly excluded as unduly prejudicial under Rule 403. State v. Blea, 101 N.M. 323, 327, 681 P. 2d 1100, 1104

(1984). A mere allegation of drug sales by a defendant charged with possession of a firearm transgresses the limit of Rule 403 even more clearly. See United States v. Sullivan, 919 F. 2d 1403, 1416 (10th Cir. 1990), cert. denied, --- U.S. ----, 113 S. Ct. 285, 121 L. Ed. 2d 211 (1992), and cert. denied, -- U.S. ----, 113 S. Ct. 1013, 122 L. Ed. 2d 161 [117 N.M. 543] (1993). In the present case, Rule 403 prohibits the admission of such prejudicial evidence." "Blea" at 288-289.

10) The NM Supreme Court later cited this decision with approval for the proposition that: "the danger of unfair prejudice from admission of drug related evidence... was great". "McDonald" at 758. Also, c.f. State v. Mills, 94 N.M. 17, 606 P. 2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P. 2d 545 (1980).

11) Other states are in agreement with New Mexico. For example, "Texas courts have consistently upheld the exclusion of evidence of a witness's prior drug use for general impeachment purposes.... Texas courts 'implicitly abolished the impeachment of witnesses with evidence of drug addiction". See Commera and Industry Ins. Co., Appellant v. Kimberly Ferguson Steward, Beneficiary to Bruce Steward, Deceased, Appellee (Tex-App., 2011). Also, see, e.g., U.S. v. Landron-Class, 714 F. Supp. 2d 278 (US Dist. Ct., D. Puerto Rico 2010).

12) Finally, it bears mentioning that the undersigned is unaware of any case permitting this sort of discovery against a witness to bribery. Indeed, such absence of case law makes sense. For this Court to set precedence, would establish poor public policy. It would not only have a chilling effect upon witnesses who wish to disclose illegal activity, it would also open the floodgates for this type of harassment to occur. Specifically, e.g., all witnesses to a crime, including police officers, and other citizens could be ordered to produce years of their prescription drug list(s).

13) Under these circumstances, it is the State's position that the Defendant's request for such information is overly intrusive of a witness to a crime.

WHEREFORE, the State of New Mexico respectfully requests that Judge Smith's Order(s) requiring witness Lisa Schultz to submit a list of nearly five years worth of prescription drugs, if any exists, to the Court for an In Camera review be set aside. Furthermore, the State requests a stay from Judge Smith's order and deadline of **June 5th** to submit Lisa Schultz's prescription list so the Supreme Court may appropriately determine if Judge Smith's Order is lawful, as any disclosure of her prescriptions, whatever they might be, prior to the Supreme Court's ruling could cause immediate and irreparable harm to both her personal and professional reputation.

Respectfully submitted,



Matthew Chandler
9th Judicial District Attorney
Special Prosecutor
417 Gidding, Suite 200
Clovis, NM 88101

Verified Petition

I hereby swear and affirm that the undersigned has read the petition and that the statements contained in the petition are true and correct to the best of the signer's knowledge, information and belief.

A handwritten signature in cursive script that reads "Matthew Chandler".

Matthew Chandler
Special Prosecutor


Certificate of Mailing

I do hereby certify that a copy of the foregoing was faxed (or mailed, or hand-delivered) to the following on the 4 day of June 2012.

Mr. Michael L. Stout
910 Lake Tahoe St
Las Cruces, NM 88007-4103
PHONE # (575) 524-1471
FAX # (575) 647-0408

Honorable Judge Leslie Smith
Emailed
Las Cruces, NM

Lisa Schultz (witness)
Emailed
Las Cruces, NM



Matthew Chandler
Special Prosecutor

Zimbra

lrdlcs@nmcourts.gov

± Font size ±

Unfiltered message

From : Michael Stout <mlstout@nm.net>
Subject : Unfiltered message
To : Schultz Lisa <lrdlcs@nmcourts.gov>
Dear Judge Schultz (Lisa),

Fri, Apr 08, 2011 02:20 PM

I don't mean to bother but a few days ago I left a message on your office phone for you to call. Surprisingly, some time later your assistant Lisa King apparently told my secretary Linda Miller that the judge "cannot" talk to me. I don't know if the quote is accurate, but I found it perplexing.

Rather than rely on information filtered through other people on our staffs will you please contact me directly? I would like for us to talk - and I know of no reason you could not - but, if there is a reason you feel you are not allowed, or if you simply don't want to, please just let me know. (Of course, you are not obligated to speak with me about any subject, but, likewise, you can if you wish.)

In any event, please contact me here or by phone so we can arrange to visit - or not.

Thanks. Hope you're well.

Michael Stout



4/11/2011 5:36 PM

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT

No. D-307-CR-2011-1G; Subfile CS 2011-07
(FILED UNDER SEAL)

IN THE MATTER OF THE
DOÑA ANA COUNTY GRAND JURY
CONVENED ON MARCH 1, 2011.

ORDER

THIS MATTER came before the Court on May 5, 2011, as part of a hearing, to determine if there were any miscellaneous matters to be addressed to keep this case on track.

1. Mr. Stout advised Judge Lisa Schultz has told him she could not speak to him regarding the grand jury investigation.
2. Mr. Chandler agrees there is no reason Judge Schultz cannot speak with Mr. Stout and advised neither he nor his investigators had told Judge Schultz not to talk to Mr. Stout or anyone else.
3. Jones, inter alia, imposes on the Court a supervisory duty to see that its grand jury and its process are not abused. The process by which witnesses are compelled to attend the grand jury is the Court's process. The Court is required to formulate a procedure to implement the target's right to alert the grand jury to potentially exculpatory evidence.
4. The discovery in this case shows Judge Schultz has spoken to the State as well as others about the subject matter of this grand jury investigation.
5. Mr. Stout is entitled to interview Judge Schultz since she has been identified as a witness for the State on May 12, 2011. Indeed, Judge Schultz is named as

FILED IN OPEN COURT

DATE 5/6/11 at 9:17am

C. J. J.
DISTRICT JUDGE

Blumberg No. 5138
STATE'S
EXHIBIT
2

a primary witness in the Target Notice. Mr. Stout needs this interview quickly so he can prepare his Jones letter.

6. This Court asked Chief Judge Driggers to speak with Judge Schultz to explain she had a duty to discuss her testimony with the defense. Judge Driggers called the Court yesterday evening to advise he had spoken to Judge Schultz about her duty. However, Judge Schultz advised Chief Judge Driggers she would not speak to Mr. Stout.

7. In light of Judge Schultz' refusal to speak to the defense, to not accept the advice of her Chief Judge, the Court is concerned a subpoena issued by the defense will not be adequate process and, therefore, this order is necessary.

8. This Court finds the interests of justice, fairness and due process requires Judge Schultz to discuss her testimony with the defense. The Court is seriously concerned her refusal will result in delaying the grand jury proceedings. The Court finds the interests of justice requires an immediate statement from Judge Schultz and specifically waives the requirement of five (5) days notice or a subpoena as required by S-503A.

9. Judge Schultz has a special duty as a lawyer and judge to respect the legal system and assist the quality of justice and not engage in conduct prejudicial to the administration of justice. Preamble and scope of Rules of Professional Conduct 16-100, et. seq.; 16-804D and 21-200A.

10. Since time is of the essence, the Court orders Judge Schultz to give an interview to Mr. Stout on or before May 9, 2011 (preferably May 6, 2011, since the Court understands the Las Cruces Courthouse is virtually shutdown due to the swearing in of

Judges Riedel and Palomino) so he can prepare his Jones letter and otherwise make informed decisions as defense counsel.

11. Mr. Stout shall contact Judge Schultz upon receipt of this Order to arrange a time for the interview today, May 6th, or May 9, 2011.

IT IS SO ORDERED.



J. C. ROBINSON
DISTRICT JUDGE, DIV. III

Certificate of Mailing

I certify a copy of the foregoing was faxed to the following on the 6th day of May, 2011

Matthew Chandler
District Attorney
FAX #(575) 769-3198

Douglas R. Driggers
Chief Judge
FAX #(575) 528-8328

Michael L. Stout
Attorney at Law
FAX #(575) 647-0408

Lisa C. Schultz
District Judge
FAX #(575) 528-8359



Trial Court Administrative Assistant

FILED

2011 SEP -9 PM 1:39

DISTRICT COURT
DONA ANA COUNTY, N.M.

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO
Plaintiff,

v.

MICHAEL MURPHY,
Defendant.

Criminal Cause No. CR-2011-560
CR-2011-1046
Judge Leslie C. Smith

**ORDER ON MOTION TO QUASH DEFENDANT'S 4th SUBPOENA DUCES TECUM,
AND VACATING AND RESETTING STATEMENT OF JUDGE SCHULTZ**

THIS MATTER comes before the Court on the Motion to Quash 4th Subpoena Duces Tecum (in this cause), Requesting Same Information Already Denied, Provision of Privilege Log and Motion for Protective Order filed on September 2, 2011. The Court held a hearing on the Motion to Quash and other matters on September 5, 2011. The Court finds the following:

WHEREFORE,

IT IS ORDERED that Judge Schultz's statement originally set for September 6, 2011 has been **VACATED** and will be **RESET** for **Monday, September 19, 2011 at 8:30a.m.** The remainder of the order entered on August 23, 2011 regarding the statement remains in effect.

IT IS FURTHER ORDERED that the Motion to Quash 4th Subpoena Duces Tecum is **GRANTED IN PART** as follows:

With respect to Paragraph 1 of the Subpoena Duces Tecum: Judge Schultz shall provide the journal at issue to the Court for an *in camera* review.

With respect to Paragraph 2 of the Subpoena Duces Tecum: subsection (a) is denied as

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vague – “inappropriate activities” calls for a judgment call on the part of the witness. With respect to subsections (b) and (c), Judge Schultz said on the record that she has searched her files and records and has produced all responsive documents; therefore, the requests are **denied as moot**. As to the emails and communications with Judge Driggers, Mr. Osborne, and Judge Valentine referred to on page 9 of the Motion to Quash 4th Subpoena Duces Tecum, the same shall be submitted to the Court for an *in camera* review.

With respect to Paragraph 5 of the Subpoena Duces Tecum: Judge Schultz shall provide the documents at issue to the Court for an *in camera* review.

With respect to Paragraph 14 of the Subpoena Duces Tecum: as written, the subpoena duces tecum is overly broad. Judge Schultz shall provide any documents concerning problems between personnel and judges or judges and judges to the Court for an *in camera* review. If Judge Schlutz is not in possession of any such documents, she shall file her response so stating.

With respect to Paragraph 16 of the Subpoena Duces Tecum: as discussed at the hearing, it is the Court’s understanding that one journal (the “Pay for Play” journal) has already been furnished to defense counsel. It is the other journal (see order with respect to Paragraph 1) prepared by Judge Schultz that is hereby ordered to be produced to the Court for an *in camera* review.

With respect to Paragraph 19 of the Subpoena Duces Tecum: Judge Schultz said on the record that she has no responsive documents; therefore, the request is **denied as moot**.

With respect to Paragraph 21 of the Subpoena Duces Tecum: As to the emails and communications with Judge Driggers, Mr. Osborne, and Judge Valentine regarding the election of the chief judge referred to on page 12 of the Motion to Quash 4th Subpoena Duces Tecum, the same shall be submitted to the Court for an *in camera* review.

With respect to Paragraph 22 of the Subpoena Duces Tecum: To the extent any responsive documents have been sent by Judge Schultz to the Judicial Standards Commission, Judge Schultz is not required to produce them in this case under the June 30 Writ from the New Mexico Supreme Court.

All documents for the *in camera* review shall be produced to the Court no later than **September 15, 2011.**

With respect to the motion for protective order: it is ordered that the statement set for September 19, 2011 will be the final statement of Judge Schultz taken by Defendant, barring additional indictments or other unforeseen circumstances. No further subpoenas or subpoenas duces tecum of Judge Schultz will be permitted before trial except as aforesaid.

IT IS FURTHER ORDERED that any motion to sever must be filed by **September 29, 2011.**

IT IS SO ORDERED.

approved telephonically September 8, 2011
LESLIE C. SMITH
DISTRICT JUDGE PRO TEMPORE

1 FBI.

2 MR. STOUT: That's two years later.
3 See, that's two year later. I'm asking her
4 earlier--

5 THE COURT: I can't help you with
6 that. Once the witness has answered the question,
7 you're stuck with the answer. Overruled. Take it
8 up. Take it up.

9 MR. STOUT: Let me give you the
10 other.

11 THE COURT: All right, go ahead.

12 MR. STOUT: I started to ask her
13 about medical issues. And I'm not trying to get
14 into sensitive area medical issues, but I was asking
15 about -- because her journal talks about her having
16 surgery, being under, having an anesthesiologist at
17 one point, having been out for several months, and
18 so forth.

19 So I was asking her, I think
20 appropriately, what kind of drugs was she under in
21 prescription form.

22 THE COURT: Sure.

23 MR. STOUT: Anti-anxiety,
24 antidepressants, whatever.

25 THE COURT: Or none.

ELSIE R. PORTER, CCR, RDR
LAS CRUCES, NEW MEXICO 575-523-8233

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1 MR. STOUT: And she would not answer
2 that question.

3 THE COURT: And the reason was? Just
4 don't want to answer it?

5 MR. CHANDLER: She raised a HIPAA
6 objection, your Honor. My two cents into that was
7 that it would be a fair question to say, Are you
8 under anything right now that is causing -- any
9 narcotics prescriptions or anything at this time.

10 THE COURT: Right now or back then
11 even.

12 MR. CHANDLER: Well--

13 THE COURT: Let's assume -- bear with
14 me. Again, I always reduce things to the absurd to
15 make sure it makes sense. So, yes, back in 2005, or
16 whenever all this started, I don't remember, I was a
17 heroin addict. So that would be relevant. I think
18 the jury would want to probably know that, don't you
19 think?

20 MR. CHANDLER: Well, it has to have
21 some relevancy to the --

22 THE COURT: Because when you're an
23 addict, you don't remember anything. Everything is
24 kind of fuzzy. You know, I don't know anything.

25 MR. CHANDLER: She's not alleging or

1 claiming anything happened while she was out on
2 surgery or out on medical leave, or anything like
3 that. All of this happened prior to her even having
4 this--

5 THE COURT: Let's get the precise
6 question. What's the question? Instead of guessing
7 about time. What's the question you want to ask
8 her?

9 MR. STOUT: Well, I don't know the
10 precise question I asked her at that time.

11 THE COURT: No, right now.

12 MR. STOUT: The issue is what
13 prescription drugs have you -- I guess it doesn't
14 have to be limited to prescription drugs, but I'm
15 assuming prescription drugs -- what prescription
16 drugs have you had prescribed and what have you
17 used?

18 THE COURT: For what period of time?
19 Since she was a baby or what?

20 MR. STOUT: Since the beginning of
21 her journal. So it would be -- naturally be at the
22 time she had this surgery, I believe it was 2008, I
23 believe. I may be wrong.

24 THE COURT: From 2008 to now, you
25 want to know her prescriptions?

1 MR. STOUT: For example --

2 THE COURT: Don't give me an example.
3 Just give me the question. I'll rule on it.

4 MR. STOUT: You like the absurd
5 example, so to make the point, right?

6 THE COURT: I don't care about a
7 point. I'm leaving in just a minute. I'm going.
8 So give me the question. I'll rule on it.

9 MR. STOUT: If she's affected by
10 drugs during any of these reports--

11 THE COURT: I'm with you, Mr. Stout.
12 Just give me the question. What is it?

13 MR. STOUT: What prescription drugs
14 have you used?

15 THE COURT: Since what date?

16 MR. STOUT: Since the date of the
17 journal.

18 THE COURT: So 2008 to present.
19 Would that be good enough? 2007 to now?

20 MR. STOUT: It would be 2007. It
21 would be August 31st, 2007.

22 THE COURT: To now, to today? What
23 prescription drugs have you been on?

24 MR. CHANDLER: And, your Honor, that
25 would be like, for example, saying that if when he's

1 saying he's in this liquor store robbery, if I got
2 robbed in 2007, what does it matter if I took -- if
3 I had surgery--

4 THE COURT: I don't care what it
5 matters. She can answer that. She can list them
6 out. It may take her awhile because she may not be
7 able to think of all of them off the top of her
8 head. But she's going to be able to get the
9 prescription information and give him the list of
10 the drugs. That's pretty simple.

11 JUDGE SCHULTZ: I object, your Honor.

12 THE COURT: Take it up. That's the
13 ruling.

14 JUDGE SCHULTZ: May I respond?

15 THE COURT: Of course.

16 JUDGE SCHULTZ: I never had an
17 opportunity to respond.

18 THE COURT: Go right ahead.

19 JUDGE SCHULTZ: I'm wondering why I'm
20 being treated like a rape victim as opposed to, say,
21 a witness of a train wreck? And I'm wondering why
22 this Court is saying that four years of my
23 prescription medication, whether--

24 THE COURT: I just told you why.
25 Because I'm ruling that it could be relevant, Judge.

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ELSIE R. PORTER, CCR, RDR
LAS CRUCES, NEW MEXICO 575-523-8233

1 saying he's in this liquor store robbery, if I got
2 robbed in 2007, what does it matter if I took -- if
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21 a witness of a train wreck? And I'm wondering why
22 this Court is saying that four years of my
23 prescription medication, whether--

24 THE COURT: I just told you why.
25 Because I'm ruling that it could be relevant, Judge.

1 Here's the way. For example, if you were
2 on a prescription drug that -- and it's going to be
3 under an order that he can't do anything with it but
4 look at it. He can't even show it to the defendant.

5 JUDGE SCHULTZ: I'm saying that this
6 is a violation of my HIPAA rights to privacy, that
7 if the Court wants to see my prescriptions to be
8 able to prove that I am not an addict, that I am not
9 on pain medication, etc. etc., but because I am
10 disabled, this is really a violation of the ADA law.
11 That because I am disabled and because I had a foot
12 surgery, now my medications are going to be
13 disclosed?

14 THE COURT: All right. Make the list
15 and show it to me. Make the list and show it to me.

16 JUDGE SCHULTZ: How do I make a list?

17 THE COURT: However you want to do
18 it. If you don't want to make it, don't make it.
19 It's up to you. I'm ordering you to do it, but if
20 you don't want to do it, I can't make you do it.
21 You don't have to give me the dosages or anything
22 else, just a list of the drugs. You can just give
23 it to me. Don't give it to him. And if the ruling
24 upsets you, Judge, I understand that. And that's
25 why there is a Supreme Court.

ELSIE R. PORTER, CCR, RDR
LAS CRUCES, NEW MEXICO 575-523-8233

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1 JUDGE SCHULTZ: I'm just saying I
2 don't know what the dates are. I don't know what--

3 THE COURT: He just asked for a list.
4 Do the best you can. Give him the list.

5 JUDGE SCHULTZ: Over a four-year
6 period, or currently, or--

7 THE COURT: Is the ruling unclear?

8 MR. CHANDLER: I'll work with her on
9 it.

10 THE COURT: 2007 until now. It's the
11 list of prescription drugs, and it comes to me. And
12 if she doesn't want to do it, that's okay. It will
13 have consequences in the case. But it will come to
14 me only. And if she also -- if the Judge doesn't
15 like the ruling, writ it. It's simple. That's why
16 there's a Supreme Court.

17 JUDGE SCHULTZ: Your Honor, I just
18 want to know why I am being treated differently than
19 all other witnesses. Why is this defendant being
20 given far more rights than any other defendant? Why
21 am I being treated --

22 THE COURT: Apparently, you've never
23 been in front of me or had me in court before,
24 because I give everybody the same treatment, Judge.
25 Everybody.

1 saying he's in this liquor store robbery, if I got
2 robbed in 2007, what does it matter if I took -- if
3 I had surgery--

4 THE COURT: I don't care what it
5 matters. She can answer that. She can list them
6 out. It may take her awhile because she may not be
7 able to think of all of them off the top of her
8 head. But she's going to be able to get the
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10 the drugs. That's pretty simple.

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17 opportunity to respond.

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20 being treated like a rape victim as opposed to, say,
21 a witness of a train wreck? And I'm wondering why
22 this Court is saying that four years of my
23 prescription medication, whether--

24 THE COURT: I just told you why.
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5 JUDGE SCHULTZ: I'm saying that this
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11 That because I am disabled and because I had a foot
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15 and show it to me. Make the list and show it to me.

16 JUDGE SCHULTZ: How do I make a list?

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22 else, just a list of the drugs. You can just give
23 it to me. Don't give it to him. And if the ruling
24 upsets you, Judge, I understand that. And that's
25 why there is a Supreme Court.

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1 it.

2 JUDGE SCHULTZ: Right.

3 THE COURT: And there is nothing
4 else?

5 JUDGE SCHULTZ: You betcha.

6 MR. STOUT: If that's the case, then
7 fine, Judge. Okay?

8 THE COURT: That's simple. That made
9 it very simple.

10 JUDGE SCHULTZ: And, your Honor, I
11 don't know in addition whether or not I need to
12 address these issues that Mr. Stout has raised,
13 because, in fact, I answered his questions and was
14 very, very clear with him.

15 THE COURT: You don't have to go
16 there.

17 JUDGE SCHULTZ: Okay.

18 THE COURT: All right, I'll--

19 JUDGE SCHULTZ: And, your Honor, it's
20 not sufficient for you to put me under oath and ask
21 me whether or not I'm an addict, or intoxicated, or
22 anything like that? That's not sufficient?

23 THE COURT: Just give the list to
24 Mr. Chandler. It's a list. If you don't want to
25 show it to Chandler, I don't care. Just send it

CR 11-560

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2012 MAY 22 AM 11:09

DISTRICT COURT
DONA ANA COUNTY, NM

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO

Plaintiff,

Criminal Cause No.: CR-11-560

CR-11-1046

Judge Leslie C. Smith

v.

MICHAEL MURPHY,

Defendant.

**Motion for Reconsideration of Court's Verbal Order of Production of Witness'
Prescription Medication(s) For Almost Five Years**

COMES NOW the State of New Mexico, by and through Ninth Judicial District Attorney Matthew Chandler (Special Prosecutor), and does hereby respectfully request that the Court issue an Order clarifying its oral directive of witness Lisa Schultz to produce almost five years of her prescription medication(s), and issue an order denying Defendant's request for this information. The basis for this request is that the Order was issued without any factual, or legal, grounds, all as more fully set forth below.

1) On September 19, 2011, the Defense conducted its' fourth (4th) questioning of Lisa Schultz (i.e. the Defense has now questioned this witness, including cross-examination under sworn oath, for approximately eighteen plus hours). For the first time, the witness was asked if she was "on" certain medication(s)? The State objected and the witness invoked her right to confidentiality pursuant to the Federal HIPPA law.



- 2) During the hearing immediately after the statement, Defense Counsel complained about the witness's answer. In response, the Court ordered the witness to produce "In Camera" a list of all prescription medications for the last four years.
- 3) Defense presented no case law in support of his request for this information.
- 4) No evidence was presented that the witness was, or is, in any manner lacking in memory, judgment, or competency.
- 5) No argument was presented that such information would be relevant, or reasonably calculated to lead to the discovery of admissible evidence, as required by the Rules of Criminal Procedure. See e.g. Rule 5-503 (C).
- 6) The State has not called into question the physical, or mental, status of the witness.
- 7) The physical, or mental, state of mind, and/or status of the witness, is neither an element of the offense(s) with which the Defendant is charged, nor an element of the defenses to those charge(s). Consequently, any information concerning this topic is non-discoverable pursuant to the rules of discovery, and the case law in New Mexico.
- 8) The charge of Bribery, e.g., in Docket CR-2011-1046, is not based in any form or fashion on the memory of the witness. In fact, it is widely based on a tape recording of the Defendant's own conversation with this witness. As such, not even a "red herring" argument concerning this witness' memory or judgment can be interposed by the Defense.
- 9) The case law in New Mexico does not support this order for production of prescription drug information of a witness. In fact, it does not even support a request for testimony concerning a witness' illegal use of drugs, let alone prescription medication.

First, the cases refer to such issues as a witness' prior drug addiction (to heroin), illegal drug trafficking/drug dealing, smoking a marijuana cigarette, etc. -- not to orders for prescription medication. See respectively, e.g., State v. Blea, 101 N.M. 323, 681 P. 2d 1100 (NMSC 1984) (hereinafter referred to as "Blea"), State v. Rael, 117 N.M. 539, 873 P. 2d 285 (NMCA 1994) (hereinafter referred to as "Rael"), and State v. McDonald, 126 N.M. 44, 966 P. 2d 752 (NMSC 1998) (hereinafter referred to as "McDonald").

10) Secondly, these cases uniformly hold that even this information is not admissible. Specifically, e.g., the New Mexico Supreme Court in "Blea" upheld a decision that Defendant's proposed cross-examination of a State's witness on her prior drug addiction was inadmissible. See "Blea" at pages 326 - 327. With all due respect, if a witness' prior drug addiction to heroin is inadmissible, the State cannot logically grasp how, exactly, is a witness's list of prescription medication relevant, or how can it reasonably lead to the discovery of admissible evidence?

11) Of course, the case law does not allow the *Defendant's* history of illegal drug information (e.g. drug dealing) at trial. As the Court of Appeals stated in "Rael":

"The danger of unfair prejudice from admission of the drug-related evidence, by contrast, was great.... Evidence that even a witness had been involved with drugs has been held to be properly excluded as unduly prejudicial under Rule 403. State v. Blea, 101 N.M. 323, 327, 681 P. 2d 1100, 1104 (1984). A mere allegation of drug sales by a defendant charged with possession of a firearm transgresses the limit of Rule 403 even more clearly. See United States v. Sullivan, 919 F. 2d 1403, 1416 (10th Cir. 1990), cert. denied, --- U.S. ---, 113 S. Ct. 285, 121 L. Ed. 2d 211 (1992), and cert. denied, --- U.S. ---, 113 S. Ct. 1013, 122 L. Ed. 2d 161 [117 N.M. 543] (1993). In the present case, Rule 403 prohibits the admission of such prejudicial evidence." "Blea" at 288-289.

12) The NM Supreme Court later cited this decision with approval for the proposition that: "the danger of unfair prejudice from admission of drug related evidence... was

great". "McDonald" at 758. Also, c.f. State v. Mills, 94 N.M. 17, 606 P. 2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P. 2d 545 (1980).

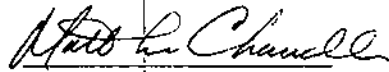
13) Other states are in agreement with New Mexico. For example, "Texas courts have consistently upheld the exclusion of evidence of a witness's prior drug use for general impeachment purposes.... Texas courts "implicitly abolished the impeachment of witnesses with evidence of drug addiction". See Commera and Industry Ins. Co., Appellant v. Kimberly Ferguson Steward, Beneficiary to Bruce Steward, Deceased, Appellee (Tex-App., 2011). Also, see, e.g., U.S. v. Landron-Class, 714 F. Supp. 2d 278 (US Dist. Ct., D. Puerto Rico 2010).

14) Finally, it bears mentioning that the undersigned is unaware of any case permitting this sort of discovery against a witness to bribery. Indeed, such absence of case law makes sense. Any such ruling would establish poor public policy. It would not only have a chilling effect upon those parties who might otherwise report illegal activity, but it would also open the floodgates for this type of harassment to occur. Specifically, e.g., all witnesses to a crime, including police officers, and other citizens (especially if they have ever had a surgery; or a disability), could be ordered to produce years of their prescription drug list(s).

15) Under these circumstances, the Defendant has not been able to articulate or establish any reasonable argument as to the relevancy or probative value of his request, which makes this fishing expedition appear to be nothing more than undue harassment of a witness for coming forward with information about alleged crimes of bribery.

WHEREFORE, based on the above set forth reasons, the State does hereby respectfully request that this Court reconsider its' previous verbal order, and deny the Defendant's request for her list of prescription drugs.

Respectfully submitted,



Matthew Chandler
9th Judicial District Attorney
Special Prosecutor
417 Gidding, Suite 200
Clovis, New Mexico 88101

Certificate of Mailing

I do hereby certify that a copy of the foregoing was faxed (or mailed, or hand-delivered) to the following on the 22nd day of May, 2012.



Matthew Chandler

Mr. Michael L. Stout
Attorney at Law
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Las Cruces, NM 88007-4103
PHONE # (575) 524-1471
FAX # (575) 647-0408

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

FILED

2012 MAY 23 AM 9:19

STATE OF NEW MEXICO

DISTRICT CLERK
DONA ANA COUNTY, NM

v.

Criminal Cause No. CR-2011-560
CR-2011-1046
Judge Leslie C. Smith

MICHAEL MURPHY,
Defendant.

ORDER RE: DISCLOSURE OF INFORMATION BY WITNESS. LISA SCHULTZ

THIS MATTER having come before the Court on the oral motion of the Defendant in open court on September 19, 2011, and the Court having heard the argument of counsel and the witness Lisa Schultz, and the Court being otherwise fully advised in the premises, finds the following:

IT IS ORDERED that Lisa Schultz shall prepare a list of any medications prescribed for her by a physician from January 1, 2007 through September 19, 2011. The list shall be submitted to the Court for an *in camera* review on or before June 5, 2012. Thereafter, the court will determine what, if any, information from that list will be revealed to the parties and under what conditions of confidentiality.

Failure to submit a list will result in the witness being barred from testifying at trial.

IT IS SO ORDERED.

Approved telephonically May 22, 2012
LESLIE C. SMITH
DISTRICT JUDGE PRO TEMPORE

STATE'S
EXHIBIT
12

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO

v.

Criminal Cause No. CR-2011-560
CR-2011-1046
Judge Leslie C. Smith

MICHAEL MURPHY,
Defendant.

**ORDER ON MOTION FOR RECONSIDERATION ON COURT'S VERBAL
ORDER OF PRODUCTION OF WITNESS'S PRESCRIPTION
MEDICATION(S) FOR ALMOST FIVE YEARS**

THIS MATTER comes before the Court on the Motion for Reconsideration on Court's Verbal Order of Production of Witness's Prescription Medication(s) for Almost Five Years, filed by the State on May 22, 2012. For the reasons stated herein, the Court finds the motion is not well-taken and should be **DENIED**.

1. The Court is aware that there are certain prescription medications, the side effects of which may include forgetfulness or memory loss. For example, benzodiazepines are among the drugs causing memory loss. These are the medications that the Court will primarily be looking for. The fact that a medication may contribute to memory loss or forgetfulness would not be character evidence as described under the Rules. *See, e.g. NMRA 11-608.*

2. The cases offered by the State in support of its motion are not relevant. The Court is not seeking evidence of a present or past drug addiction, nor is the Court considering the list of prescription medication for purposes of character evidence. At this time, the Court simply wants to review whether the medications taken by the witness *at the relevant time* have side effects that include memory loss or forgetfulness.



3. Finally, as the State noted in its motion, on September 19, 2011 the Court ordered the witness, Lisa Schultz, to provide a list of prescription medications for the Court to review *in camera*. Because this motion to reconsider was filed more than eight months after the Court's order, the Court considers this motion to be untimely.¹

The Court will review the evidence *in camera* as ordered.

WHEREFORE,

IT IS ORDERED that the Motion for Reconsideration on Court's Verbal Order of Production of Witness's Prescription Medication(s) for Almost Five Years is **DENIED**. The witness shall deliver a list to the Court as ordered no later than June 5, 2012.

IT IS SO ORDERED.

Approved telephonically June 4, 2012
LESLIE C. SMITH
DISTRICT JUDGE PRO TEMPORE

¹ The Court did order a stay that effectively halted the proceedings on November 21, 2011, but the stay was modified in April, 2012 to clarify that the case is only stayed with respect to the misdemeanor charge.