

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff

v.

No. CR-11-560
Judge Leslie C. Smith

MICHAEL MURPHY,

Defendant

MOTION TO DISMISS INDICTMENT (#1)
(IMPROPER TARGET NOTICE)

COMES NOW the defendant, Michael Murphy, through his attorneys, The Law Offices of Michael L. Stout, and respectfully moves the Court to dismiss without prejudice the grand jury indictment in this cause.

As grounds, counsel states that:

A. BACKGROUND.

1. The defendant is charged by indictment with four counts:

Count 1 - Demanding a Bribe, §30-4-2 NMSA.

Count 2 - Bribery of a Public Officer or Employee, §30-24-1 NMSA.

Count 3 - Criminal Solicitation, §30-28-3 NMSA and §30-24-2 NMSA.

Count 4 - Intimidation or Retaliation of a Witness, §30-24-3(A)(2) NMSA.
2. The New Mexico statutes require notice to a target of the crime being investigated by the grand jury. §31-6-11 NMSA 2003. Coinciding with the

right to notice of the charge are other rights including the right to counsel, the right to testify or not testify, the right to ten (10) days notice before testifying, the right to present evidence to the prosecutor for presentation to the grand jury, and the right to pose questions to witnesses concerning the charge being investigated.

[See Defendant's separate Memorandum Re: New Mexico Grand Jury Law.]

3. Because of the rights afforded a target, the initial notice of the charge being investigated is critically important. The target notice is required and is not discretionary.
4. A target not incarcerated is allowed no less than ten days notice before the testimony in order to effectively exercise rights under the statutes and rules.
5. Because of the importance of the target notice, the prosecutor must seek permission from the court in order to avoid giving notice of a charge to a target. See NMSA §31-6-11(C). The target notice is required and is not discretionary.

B. NO NOTICE WHATSOEVER WAS GIVEN AS TO COUNTS 2 & 4.

6. The prosecutor did not provide a target notice of any kind concerning counts 2 and 4 of the indictment.
7. The prosecutor did not seek or gain permission from the court to allow no notice as to the charges. Nor did the prosecutor have any other reason

required by the statute to gain such permission.

8. Consequently, the target was not notified of the crimes of “Bribery of Public Officer or Employee” or “Intimidation or Retaliation of a Witness” and could not exercise his rights under the grand jury statutes and rules.
9. Prejudice is not required to be shown if a target notice is not delivered as required. See NMSA §31-6-11(B). Absence of a target notice requires dismissal of the charges not noticed.

C. EFFECTIVELY NO NOTICE GIVEN AS TO COUNTS 1 & 3.

10. Throughout this proceeding, counsel for the target sought to receive adequate notice of the charges being investigated. The grand jury judge agreed and advised the prosecutor to issue a target notice that “shall contain declarative factual statements of what the State contents the target did to violate the statutes.” Minute Order of April 18, 2011. This is a typical and reasonable requirement so that the target can make decisions concerning the exercise of his rights.
11. The prosecutor failed to provide a “declarative factual statement” as ordered. The prosecutor had ample opportunity to clearly explain what facts the prosecutor alleged as a crime. Even though Judge Robinson engaged in lengthy discussion with the prosecutor about the issue, the prosecutor would not - perhaps because he could not - follow the court's order to provide declarative factual statements.
12. The latest target notice of May 6, 2011 was appropriately ordered

quashed by the grand jury judge as inadequate (See Order Upon Hearing Granting Motion to Quash Target Notice of May 6, 2011) and another notice was not filed. Thus, there was effectively no target notice given.

13. The required information is necessary to allow the target to exercise his or her rights under the grand jury statutes. NMSA 1978 §31-6-1 et. seq.; See also *Rogers v. State*, 94 N.M. 218, 221, 608 P.2d 530 (Ct. App. 1980) (deciding that the notice requirement is intended to allow the target to exercise his or her rights at the grand jury). Aside from the right to proper notice of the proceedings, the target has specific rights discussed above.

In examining his rights, a target might discover/decide what information he or she would like to give to the grand jury, whether or not to testify, and/or to propose appropriate questions to the prosecutor for witnesses at the grand jury. Specific information is needed in order to effectuate these rights. Simply reciting the statute or giving a vague comment is not sufficient to fulfill the intent of the statute.

14. In addition to the target's statutory and rules of criminal procedure rights, the information was needed in order to allow counsel to properly advise his client concerning his rights at the grand jury and to determine any possible information to give the special prosecutor for transmission to the grand jury pursuant to *Jones v. Murdoch*, 2009-NMSC-002.
15. Prejudice is not required to be shown if a target notice is not delivered as required. See NMSA §31-6-11(B).

D. JUDGE ROBINSON WAS CORRECT THAT THE LATEST NOTICE WAS DEFECTIVE.

- 16.** As ordered by Judge Robinson, the latest notice (Fourth Amended Target Notice) was defective. Even if that target notice, which was ordered quashed, it was not adequate to give fair notice to the target for the reasons given by Judge Robinson in his order.
- 17.** Though no prejudice is required, Judge Murphy was prejudiced by the deprivation of his rights the under the statutes and rules, including the right to present exculpatory evidence, the right testify, and the right to pose questions of witnesses.

WHEREFORE, the defendant requests the Court to dismiss without prejudice the indictment in this cause.

Respectfully submitted,

Michael L. Stout
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CERTIFICATE OF SERVICE

I, Michael L. Stout, hereby certify that a true and correct copy of the foregoing instrument was faxed to Special Prosecutor Matthew Chandler at 575-769-3198 on this _____ day of July, 2011.

Michael L. Stout