

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 (#2)
(PRESENTATION OF NON-COMPETENT AND IRRELEVANT EVIDENCE)

COMES NOW the defendant, Michael Murphy, through his attorneys, The Law Offices of Michael L. Stout, and respectfully moves the Court to dismiss the indictment in this cause.

As grounds, counsel states that:

1. The defendant is charged by indictment with four counts, including demanding a bribe, bribe of a public official or employee, criminal solicitation, and intimidation or retaliation against a witness.
2. New Mexico statutes require that evidence presented to the grand jury be lawful, competent, and relevant. §31-6-11 NMSA 2003.
3. The New Mexico Rules of Criminal Procedure require that evidence presented be “lawful, competent, and relevant.” NMRA 5-302A. [See Defendant's Memorandum Re: New Mexico Grand Jury Law.]

4. The competency of the evidence presented to the grand jury is subject to review by this Court. See NMRA 5-302A(F).

5. "Competent" evidence is defined as "evidence which in legal proceedings is admissible for the purpose of proving a relevant fact." Chiordi v. Jernigan, 46 N.M. 396, 402, 129 P.2d 640, 643 (1942). "[H]earsay evidence is incompetent and inadmissible to establish a fact." Id.

6. Relevant evidence is described by Rule 11-401 NMRA as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

7. Several items of non-competent and/or irrelevant evidence were presented to the grand jury in this case.¹ For example:

A. The prosecutor solicited hearsay testimony from Judge Lisa Schultz as to what she had been told by Beverly Singleman, the alleged subject of a bribe. Grand Jury Transcript (hereinafter TR) at Pg 63 Ln 9 thru Pg 64 Ln 12. Judge Schultz has no competent evidence concerning the alleged bribe of Beverly Singleman because she was not present during the alleged event.

B. The prosecutor allowed Lisa Schultz to give hearsay information, to speculate and to comment improperly on the evidence by testifying that Beverly Singleman was "disturbed by this [Judge Murphy's] deeply inappropriate suggestion." [allegedly to make donations to a local political

¹ The recorded testimony of the TR is flush with examples of such evidence, and, although this motion will highlight some examples of such evidence, only a full reading of the evidence at the grand jury can fully demonstrate and contextualize each instance of such evidence.

figure]. TR at Pg 64 Lns 13-14.

C. The prosecutor solicited testimony from Judge Lisa Schultz about what she had been told by Judge Rudy Apodaca, Judge James Wechsler, and Justice Petra Maes, including information and advice about Judge Schultz's accusations against Judge Murphy. TR at Pg 80 Ln 16 thru Pg 83 Ln 23. None of the witnesses were called to testify before the grand jury.

D. Judge Schultz gave her opinion on whether a judicial nominating committee would be something to come before a judge in his or her "official capacity." TR at Pg 60 Lns 15-19.

E. The prosecutor elicited testimony from Judge Schultz about how this case has negatively affected her. Judge Schultz testified that she was concerned about her safety, career, and reputation "with good reason." She testified that people she knew had suggested she should leave the State of New Mexico. She testified that this has been the most difficult period of her life, and that she has suffered ongoing consequences for reporting this matter. She testified that she had "not only nothing to gain...[but] everything to lose [by being involved in this case]." TR Pg 94 Ln 5 thru Pg 100 Ln 3.

F. Judge Schultz testified that Judge Murphy and another witness "understood exactly what [she] was saying" when she spoke to them about alleged bribes. TR at Pg 93 Ln 24 thru Pg 94 Ln 1.

G. Judge Bridgforth was allowed to testify that Judge Murphy had told him that he had paid \$4,000.00 for his judicial appointment. TR at Pg 114 Ln 11 thru Pg 115 Ln 4. This is not relevant to the charges being investigated.

H. Hearsay testimony was solicited from Judge Bridgforth about statements by Edgar Lopez regarding political influence. TR at Pg 117 Ln 13 thru Pg 118 Ln 16.

I. Irrelevant and hearsay testimony was solicited from Judge Bridgforth regarding Edgar Lopez' efforts to persuade Judge Bridgforth to retire in time to allow for the appointment of another local attorney named Larry Pickett. TR at Pg 118 Lns 3-25. The prosecutor solicited testimony from Edgar Lopez about his efforts to have Judge Bridgforth retire so that a Democrat Governor would make the appointment replacing Judge Bridgforth. TR at Pg 184 Ln 15 thru Pg 185 Ln 7.

J. Edgar Lopez testified that Judge Murphy got his position as a judge because he was well-qualified for it. The prosecutor then asked about an alleged statement that Edgar Lopez had made that Judge Murphy was not qualified to be a judge, but there was no good faith reason to imply to the grand jury that such a statement had ever been made. TR at Pg 174 Lns 2-12.

K. Norm Osborn, who is a staff attorney at the third judicial district court, testified to hearsay, things he had heard regarding Edgar Lopez and

his position. TR at Pg 132 Lns 8-20.

L. A hearsay memorandum prepared by Norm Osborn giving his legal opinion regarding the allegations in this case was introduced into evidence. TR at Pg 132 Ln 21 thru Pg 133 Ln 10 (marked as Grand Jury Exhibit No. 3).

M. Norm Osborne testified as to statements allegedly made by Judge Murphy concerning guns and alleged threats. TR at Pg 137 Ln 4 thru Pg 138 Ln 23. This information was only not lawful, competent, or relevant, but had been ordered excluded by the court as being not lawful, competent, or relevant.

N. Multi-level hearsay testimony was solicited from Norm Osborn that the Chief Judge of the New Mexico Supreme Court had paid a million dollars for his position. TR at Pg 139 Ln 20 thru Pg 140 Ln 11.

O. The prosecutor solicited testimony from Norm Osborn about Judge Murphy's feelings about the grand jury judge. TR at Pg 140 Ln 12 thru Pg 141 Ln 14.

P. The prosecutor solicited testimony about the security of Norm Osborn's job if Judge Murphy continued to serve as a district court Judge. Norm Osborn testified that it would be difficult for him to continue to work in the courthouse if Judge Murphy remained a judge. TR at Pg 141 Ln 15 thru Pg 144 Ln 4.

Q. Norm Osborn gave his opinion on how donations are made to

political parties/candidates. TR at Pg 145 Ln 4 thru Pg 146 Ln 3.

R. The prosecution solicited Norm Osborn's legal opinions on the ethics and legality of alleged behavior by Judge Murphy. TR at Pg 146 Ln 21 thru Pg 148 Ln 6.

8. Indictments cannot be based on incompetent or irrelevant evidence, including the kind that was given in this case.
9. An evidentiary hearing is required to resolve this motion.

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