

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 (#4)
(DUE TO IMPROPER JURY INSTRUCTIONS)

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.
2. Jury instructions at a grand jury proceeding are critical. Proper instruction of the grand jury on the record is mandatory. NMRA 5-3-2(A)(C); *State v. Ulibarri*, 128 N.M. 686, 687 (N.M. 2000) (decision explained fully by Court of Appeals Decision in *State v. Ulibarri*, 1999 NMCA 142). Failure to do so is structural error requiring a dismissal of the indictment. *Id.*
3. No prejudice is required to be shown if proper instructions are not given on the record. The indictment must be dismissed without prejudice. [See

Defendant's Memorandum Re: New Mexico Grand Jury Law, filed separately.]

4. Instructions in this case (Grand Jury Transcript - hereinafter TR - attached as Attachments 1 & 2) were improper for the following reasons:

A. Prosecution instructions.

1. **Count 1.** Count 1 of the indictment charges “Demanding a Bribe” contrary to NMSA §30-24-2. The language of the count is

“...on or about September 13, 2007, in Dona Ana County, New Mexico, the above-named defendant, did, directly or indirectly, solicit anything of value, with the intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby and which by law is pending or might be brought before him in his official capacity, a third degree felony, contrary to Section 30-24-2, NMSA 1978.”

However, the prosecutor did not instruct the grand jury as to these elements. Specifically, though it is stated in the indictment, the prosecutor did not include the term “thereby” and thus did not include an essential element and the required concept that the defendant's decision must be influenced by the thing of value that is allegedly solicited. TR at Pg 23 Lns 8-17 and Pg 210 Ln 25 thru Pg 211 Ln 14.

Prejudice is not required to be shown when instructions are defective as here. Nonetheless, the omission of the word “thereby” is no small matter when the allegation is apparently that the defendant's comments were soliciting money to be given to a third party (the Democratic Party) – not to the defendant himself – and that the third party

contact is alleged to have influenced the defendant's behavior. "Thereby" is central under the circumstances, not to mention being required under New Mexico statutes.

As to necessary definitions, the prosecutor instructed the grand jury that the definition of "solicitation" is: "asking, enticing, or urging a request. A solicitation is any action that one of the parties construes into a serious request." TR at Pg 26 Ln 25 thru Pg 27 Ln 3 and Pg 213 Lns 8-22.

Solicitation is defined under New Mexico law as "to make petition to approach with a request or plea." *Bustamante v. De Baca*, 119 N.M. 739, 742 (N.M. Ct. App. 1995) (Citing Webster's Third New International Dictionary at 2169 and Black's Law Dictionary at 1392.)

This additional language added by the state creates a purely subjective measure of solicitation. This has no basis in New Mexico law. In fact, New Mexico law has frequently rejected using a victim/witness' subjective belief to satisfy an element of a crime. *State v. Jones*, 129 N.M. 165, 171 (N.M. Ct. App. 2000) (A victim's subjective and unsubstantiated fears cannot be the basis of a felony charge); *State v. Trujillo*, 132 N.M. 649; 2002 NMCA 100; 53 P.3d 909 (Child's subjective fear of being struck cannot be basis of child abuse charge).

2. Count 2. The grand jury was instructed at two different times, in conflicting ways, as to count 2. The indictment charges "Bribery of a Public Officer" contrary to §30-24-1 NMSA. However, the grand jury

was instructed as to the different crime of “Demanding a Bribe” contrary to §30-24-2 NMSA, at which time it was explained by the prosecutor that this charge arose from a trading of votes between Judge Schultz and Judge Murphy (“...the target Michael Murphy solicited directly or indirectly Third Judicial District Judge Lisa Schultz to give up her future vote in a district judge's nominating committee in return for his vote in a district judge's nominating committee, both things of value...”) TR at Pg 25 Lns 20-25.

Nonetheless, the prosecutor instructed the jurors differently as to this count later in the proceedings (TR at Pgs 211 and 212). In fact, he instructed as to a different statute altogether, §30-24-1 NMSA, in which there is no mention of the facts previously alleged (trading votes). Thus, the charge is not only not alleged in the target notice, it is also improperly instructed upon.

3. Count 3. Criminal solicitation was not properly instructed because the elements of the underlying crime alleged to have been solicited are not given at all, as required by Use Note 2 of UJI14-2817. Note that the underlying crime here is not the same as any other crime charged in the indictment. For example, it is not the same as that in count 1. (Count 1 alleges a bribery by Judge Murphy. Count 3 alleges a crime with different elements and different actors.). Thus, there is no instruction as to the essential elements of criminal solicitation. TR at Pg 26 Lns 8-20 and Pg 213 Lns 8-22.

4. Count 4. Count 4 of the indictment charges intimidation or retaliation against a witness contrary to §30-24-3 NMSA(A)(C). Again, there was no notice given of this charge. TR at Pg 213 Ln 23 thru Pg 214 Ln 18.

The prosecutor failed to instruct on all essential elements of the crime. See UJI14-2402. The Uniform Jury Instructions provide the appropriate instruction and they require that the witness in question be identified by name. Here, instead, the prosecutor simply refer to “the victim.”

The Uniform Jury Instructions also require that there be a finding of an “official proceeding”. UJI 14-2402(3) requires that the element “_____ (*name of proceeding*) was an official proceeding.” be instructed upon. This essential element was omitted. Thus, the instruction was inadequate.

5. Accessory instructions. The prosecutor twice instructed the grand jury as to accessory liability on the part of the target. TR at Pg 27 Lns 4-11 and Pg 215 Lns 2-13. This instruction reads

The target may be charged with a crime even though he himself did not do the acts constituting the crime. At least eight of you must find probable cause to believe that if the target Michael Murphy intended the crime to be committed, number two, the crime was committed, three, the target Michael Murphy helped encouraged or caused the crimes to be committed. This is the aiding or abetting statute. It's not a violation of law. You don't have to determine or have a finding on that, but it's in there for your use as an accessory.

In other words, even though Michael Murphy is an alleged principal and there is no accessory, the prosecutor is attempting to prejudice the jury by persuading it that Michael Murphy can be indicted even if he didn't commit the crimes alleged in the target notice. If he did not solicit a bribe, he cannot be charged as accessory under the law or under the facts of this case.

B. Defense instructions. In addition to improper elements instructions, the prosecution failed to provide the grand jury with instructions on defenses and other instructions necessary to a fair consideration of the issues.

The New Mexico Rules of Criminal Procedure require that the prosecuting attorney at the grand jury provide instructions on the defenses raised by the evidence and any other instructions that are necessary to the fair consideration by the grand jury of the issues presented. NMRA 5-302A(C).

In this case, Judge Murphy is accused of crimes stemming from his political advice he gave to others that they should be active in the local party in order to position themselves for a gubernatorial appointment. That included discussion and advice on making political contributions.

It is also, in part, based on Judge Murphy having private conversations with other judges discussing persons he would like to see become judges, and persons he supported and thought others should

support.

Judge Murphy cannot be convicted of a crime based on private political speech. Defense counsel proffered the following instructions to the court and the prosecutor for presentation to the grand jury:

GENERAL INSTRUCTIONS ON FIRST AMENDMENT

A judge may ethically and legally make private statements supporting other judges or judicial candidates. Only public statements of a judge, such as public speeches, concerning political matters may be regulated. Inquiry Concerning a Judge (Vincent), 143 N.M. 56 ¶ 18 (2007).

There may be no law abridging the freedom of speech. First Amendment to the United States Constitution. Political contributions are protected first amendment speech. Buckley v. Valeo, 424 U.S. 1.

The First Amendment prohibits fining or jailing citizens, or associations of citizens, for simply engaging in political speech. Citizens United v. FEC, 130 S. Ct. 876 (U.S. 2010).

An elected Judge has the same constitutional rights as a citizen. It is legal for a judge to give money to political campaigns or parties. It is not a violation of the law to give money to a political campaign or party or to privately encourage others to do so. Inquiry Concerning a Judge (Vincent), 143 N.M. 56 ¶ 18 (2007).

The prosecutor refused to tender the suggested instructions or alternative forms of the instructions. This violated NMRA 5-302A(C), and, it is a structural error that requires dismissal without prejudice. Nonetheless, this clearly was prejudicial. Grand jurors asked questions about whether it was legal for judges to make political contributions and other political questions. And the prosecutor argued with one of the

witnesses about whether or not it was a crime for a judge to solicit political contributions. TR at Pgs 122-123 and Pgs 147-148.

C. Summary. The instructions were inadequate and improper. Prejudice is not required to be shown. The indictment must be dismissed without prejudice.

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

Respectfully submitted,

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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