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**FILED**

**STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT**

2011 OCT 17 PM 12: 20

DISTRICT COURT  
DONA ANA COUNTY, NM

**STATE OF NEW MEXICO  
Plaintiff,**

v.

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

**MICHAEL MURPHY,  
Defendant.**

**ORDER ON STATE'S AMENDED MOTION FOR RECONSIDERATION OF  
COURT'S ORDER ON DEFENDANT'S MOTIONS TO RECONSIDER**

**THIS MATTER** comes before the Court on State's Amended Motion for Reconsideration of Court's Order on Defendant's Motions to Reconsider filed on October 3, 2011. The Court finds that the motion is well-taken and shall be **GRANTED**.

**I. Law on Motions to Reconsider**

1. Motions to reconsider are not favored. Only when there has been new authority unnoticed by both the parties and the court or when the court has ignored a dispositive point, are these motions filed and even then, are rarely granted. However, when the original briefing is incomplete both as to the prior facts of the case and authority is lacking altogether, then a motion for reconsideration becomes, in reality, the initial motion! In the present action, the State even informed the Court that its practice was not to respond to motions to reconsider – and after this Court granted such a motion (with no response from the State), the State then filed its *own* motion to reconsider.

2. Failing to provide complete information can be just as misleading to a Court as purposefully giving inaccurate information.<sup>1</sup> From now on the attorneys working on this case shall consider the *first motion* to be the one in which they provide the Court with full and accurate information and authority. The Court refuses to be led into error because of what I consider to be incomplete briefing.
3. “Every presumption favors the correctness of any ruling or decision of the trial court, and a party alleging error must be able to point clearly to it.” *State v. Weber*, 76 N.M. 636, 644, 417 P.2d 444, 449 (1966) (citations omitted); *see also State v. Carlos A.*, 122 N.M. 241, 243, 923 P.2d 608, 610 (1996).

## **II. Analysis**

4. The Court granted Defendant’s motion to reconsider #3 on the issue of exculpatory evidence in part out of an abundance of caution on three specific issues: 1) To recall Judge Martin for testimony with an order of use immunity in place; 2) To give the probable cause determiner the benefit of the Osborne affidavit; and 3) If the prosecution refers to money changing hands, the probable cause determiner shall have the benefit of the disputed bank records. At the time of the previous order granting the Defendant’s motion to reconsider in part, the Court was not given the authority now presented by the State, nor did either party submit evidence that the hearing on use immunity was *ex parte*.

### **A. Issue 1: Use Immunity**

5. The State asserts that the granting of use immunity for Judge Martin was improper under *State v. Belanger*, 146 N.M. 357, 210 P.3d 783 (2009). The State argues that the grant of

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<sup>1</sup> For example, the Court was unaware that the Use Immunity Order was issued after an *ex parte* hearing. That information was relevant to the original motion to dismiss and to the Defendant’s motion to reconsider. Not only should the Defendant’s lawyer have shared that information, but the State should have responded to the original motion to reconsider and provided that pertinent detail.

use immunity by Judge Robinson was improper, because the State did not have an opportunity to be heard, nor did the Court apply a balancing test as directed by *Belanger*. 146 N.M. at 367, 210 P.3d at 793. The Court agrees.

6. The *Belanger* Court directed that:

Before granting use immunity to a defense witness over the opposition of the prosecution, district courts should perform a balancing test which places the initial burden on the accused. The defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the district court must then balance the defendant's need for the testimony against the government's interest in opposing immunity. A court cannot determine whether a judicial grant of use immunity is necessary without assessing the implications upon the Executive Branch. (quotation marks and citation omitted). In opposing immunity, the State must demonstrate a persuasive reason that immunity would harm a significant governmental interest. If the State fails to meet this burden, and the defendant has already met his burden, the court may then exercise its informed discretion to grant use immunity . . . .”

*Id.*

7. Defendant has presented no evidence that he met his burden under *Belanger* when arguing this issue to Judge Robinson. Moreover, the State did not have a chance to demonstrate to Judge Robinson that immunity would be harmful, because the order on use immunity was issued after an ex parte hearing. For these reasons, the State's motion to reconsider will be granted on issue 1 – the main issue on which the Court granted the Defendant's motion to reconsider.

## **Issue 2: Osborne Affidavit**

8. Defendant had claimed that certain exculpatory evidence was not presented with respect to an affidavit given by Norman Osborne. Because the Court originally granted Defendant's motion to reconsider in part on the issue of exculpatory evidence, the Court

also directed the parties to reexamine this issue as well when the case returned to the grand jury. As shown in the State's brief, however, Judge Robinson ruled that the Osborne affidavit was irrelevant, and the Defendant has failed to satisfactorily demonstrate that the ruling was improper.<sup>2</sup> For these reasons, the State's motion to reconsider will be granted on issue 2.

**B. Issue 3: Bank Records**

9. Defendant had claimed that no exculpatory information was given with respect to Defendant's bank records. Again, the Court included this secondary issue as a subject for the parties to reexamine when the case returned to the grand jury. According to the transcript provided by the State, the grand jury was given the option of examining the records at issue but chose not to. (*See State Mtn to Reconsider at 4.*) The Defendant has failed to satisfactorily demonstrate that it was improper for the State not to introduce the bank records in light of the facts revealed in the State's motion. Moreover, the Defendant has failed to sufficiently demonstrate that the bank records qualify as exculpatory evidence. For these reasons, the State's motion to reconsider will be granted on issue 3.
10. For these reasons, the State's entire motion to reconsider will be granted, the Defendant's motion to reconsider will be denied, and the case will go forward.

**WHEREFORE,**

**IT IS ORDERED** that the State's Amended Motion for Reconsideration of Court's Order on Defendant's Motions to Reconsider is **GRANTED**. **No further motions on this issue will be considered.**

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<sup>2</sup> The Court cannot ascertain whether Defendant revealed that Judge Robinson had already ruled on the Osborne affidavit. This is obviously relevant information that either the Defendant should have provided and/or that the State should have brought forth in response to Defendant's motion to reconsider.

**IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "Leslie C. Smith", written over a horizontal line.

**LESLIE C. SMITH  
DISTRICT JUDGE PRO TEMPORE**