

STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO,  
Plaintiff,

v.

No. D-307-CR-201100560  
D-307-CR-201101046  
Judge Leslie C. Smith

MICHAEL MURPHY,  
Defendant.

**STATE'S MOTION FOR RECONSIDERATION OF COURT'S ORDER  
ON DEFENDANT'S MOTIONS TO RECONSIDER ORDERS ON MOTIONS TO  
DISMISS #1, #2, #3, #4, AND #5**

COMES NOW the State of New Mexico, by and through its District Attorney Matthew Chandler (Special Prosecutor) and respectfully submits its Motion for Reconsideration of Court's Order on Defendant's Motions to Reconsider Orders on Motions to Dismiss #1, #2, #3, #4, and #5. Specifically, the Court reaffirmed its denial of defendant's Motions #1, #2, #4, and #5, and granted Motion #3 in part and denied the same in part. The State requests relief as it pertains to the Court's Order regarding Motion #3. As grounds for reconsideration, the State provides:

1. The Court granted the motion to the extent that it dismissed the case for a new determination of probable cause for three reasons: to recall Judge Martin for testimony with an order of use immunity in place; to give the grand jury the benefit of the Osborne affidavit; and, to provide the disputed bank records if the prosecutor refers to money changing hands.

2. The Defendant had claimed that no exculpatory information was provided as to Judge Martin's testimony, i.e., that nothing inappropriate occurred at the lunch where the bribery took place. The Grand Jury heard directly from Beverly Singleman, who attended the lunch and from Judge Schultz, who recorded and reported what was told to her. Judge Martin refused to answer the question ("I've discussed this matter with my attorney. Based on the advice of my attorney, I respectfully decline to answer this question.") **See State's Attachment 1**, TR-201. He had previously stated he "didn't remember".

3. The Defendant had claimed that no exculpatory information was provided as to Judge Martin's testimony that Judge Schultz never spoke to him and Judge Murphy about what she felt was inappropriate behavior. Again, Judge Martin refused to answer the question based on advice from counsel. **See State's Attachment 2**, TR-202. It was clear that Judge Martin would not answer any material questions as to the crimes charged, his presence, or his knowledge. He had previously stated he "didn't remember." **See State's Attachment 3**, transcripts of Martin interviews February 1 and 2, 2011.

4. The initial granting of use immunity for Judge Martin and this new order for granting use immunity are improper and in violation of procedure established by case law. **See State v. Belanger**, 2009-NMSC-025.

5. The New Mexico Supreme Court, in **Belanger**, ruled that New Mexico Courts

have authority to grant a witness use immunity under certain limited circumstances. 2009-NMSC-025. There must be a balancing test applied, and the burden is on the defendant to show the necessity. If the defendant appears to meet the burden, the State must reply and show the harm (or uselessness) of the immunity. The Court is then to issue a ruling. **Id.**

6. In the first order for use immunity granted by Judge Robinson, the motion for use immunity was filed by defendant's counsel and granted *ex parte*. In fact, the order was not signed until 5:25pm. The State was not delivered this Order until after approximately 6:00pm that day, while the Grand Jury was in deliberation. This chain of events (ex parte motion and order rendered without hearing, and the ultimate late delivery) clearly violates the holding of **State v. Belanger**.

7. Despite those significant procedural issues, Judge Martin was interviewed twice in the initial phases of the investigation (before the Grand Jury convened). Both times, he "could not remember" or "didn't know" the issues placed before him – the same issues placed before him at the Grand Jury. It is disingenuous as well as deceptive for anyone to assert that his memory or knowledge would "improve" with a use immunity order. That in and of itself renders his testimony unreliable and contrived.

8. In this Court's order to grant use immunity, the same procedural deficiencies apply per **Belanger**.<sup>1</sup> The court's role is to mediate between the defendant and the State in issues of use immunity. *Id.* at ¶ 59. The **Belanger** Court also stated that "while the

reasons for unfettered prosecutorial control over use immunity are in some cases strong, they do not overcome the need for judicial intervention in every case”. Id.

9. For the above reasons and analysis, the Court is requested to rescind its order for use immunity for Judge Martin.

10. The Defendant had claimed that no exculpatory information was provided concerning the Defendant’s bank records, i.e., it showed innocent transactions and no payment of \$4000. In fact, the Grand Jury transcript belies the Defendant’s claim that no exculpatory information was presented. **See State’s Attachment 4**, TR- 204-207. At TR-204 Line 5, the foreperson asked the prosecutor whether the Defendant’s financial records were subpoena-ed, with specific inquiry toward checks written. At TR-207 Line 10, the prosecutor advised that he had a witness available to testify to that very subject, and asked whether the Grand Jury wished to hear from that witness. At TR-207 Line 13, the foreperson stated yes, and while the prosecutor was preparing to call the witness, the foreperson asked, “Before we do that, do you know if he will provide any substantial testimony or any – or informative testimony to this grand jury?” TR-207 at Line 16,

11. The prosecutor responded that he couldn’t comment on that, but that the witness could provide the panel with records and testify as to what he has received and reviewed. TR-207 at Line 20.

12. The prosecutor stated at TR-205 Line 5, that relevance was in issue, as the records would not prove or disprove whether the Defendant solicited anyone to give. The

prosecutor indicated that the records were available and was interrupted in the course of saying, “and we can certainly —“ TR-205 Line 14. This was a correct statement of the facts learned in this case. The Defendant was never accused or charged of receiving payments, only that he was soliciting others to give payments and never indicated that any payments were to be given to him. The Foreperson then stated “Well, let’s hold off on that a minute.” TR-205 at Line 16.

13. The absence of any evidence contained in the bank records was neither exculpatory or inculpatory, and thereupon, is not required to be presented to the Grand Jury as they are not relevant. The defendant is not and has not been charged with *accepting* bribes, receiving money from others, channeling money from others, or even “paying” for his own seat on the Bench. He is charged with solicitation.

14. Given the non-relevant nature and neutral impact of the bank records, the State requests that the Court rescind its Order to produce these records to a new Grand Jury.

15. The Defendant had claimed that exculpatory information was not provided concerning the testimony of Norman Osborne as to the context of the statements made by Judge Murphy and his perception that they are not serious. That is entirely contradictory to the sworn testimony provided by Mr. Osborne at Grand Jury. In fact, Mr. Osborne took these threats so seriously, that he reported them to law enforcement. **See State’s Attachment 5**, TR-136-138. In his testimony, Mr. Osborne stated that he “didn’t know whether to take it seriously”. TR-137. Again, this is exculpatory information that was in fact presented to the Grand Jury. 2

16. On the morning of the Grand Jury proceeding at a pre-Grand Jury hearing,

Defense Counsel briefly gave the State a copy of a affidavit that Mr. Osborne signed (allegedly at Defense Counsel's behest) but failed to provide a copy of this "affidavit" for the State. 3

17. Nevertheless, at that same hearing, Judge Robinson struck the Osborne affidavit from presentation at the Grand Jury, ruling that it was not relevant. At that time, Defense Counsel took back the Osborne affidavit from the State.

18. Further, after the Grand Jury presentation and resultant indictment, the State was still not in possession of the Osborne affidavit, and filed a motion stating that fact. At a June 24, 2011 hearing, the State demanded not only the Osborne affidavit but also any other statements/affidavits that defense had in its possession. Defense Counsel stated that he did not have anything to give the State. **See State's Attachment 6**, June 24, 2011 transcript.

19. The law in New Mexico is clear as to exculpatory information. "Generally, courts have been most cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor." **Buzbee v. Donnelly**, 96 N.M. 692, 696-97, 634 P.2d 1244, 1248-49 (1981). "Dismissal has been limited to those few instances where the prosecutor has *clearly* abused the grand jury process." **Id.** [emphasis added]. The **Buzbee** Court held that Section 31-6-11(B) "means the prosecutor shall present evidence, that would be admissible at trial, which directly negates the guilt of the target." **Id.** at 699, 634 P.2d at 1255. "Substantial prejudice to the defendant must be demonstrated before the province

of the independent grand jury is invaded." **Id.** at 703, 634 P.2d at 1259.

20. In order to be entitled to a dismissal of an indictment based upon a claim that the state failed to present exculpatory evidence to the grand jury as required by Section 31-6-11(B), a defendant must satisfy a three-pronged test: defendant must establish demonstrable prejudice resulting from the acts or omissions of the prosecutor; evidence which is claimed to be exculpatory must constitute evidence directly negating the guilt of defendant; evidence claimed to be exculpatory must be evidence which would be legally admissible at trial. **See State v. Hewitt**, 108 N.M. 179, 182, 769 P.2d 92, 95 (citations omitted). **See also State v. Lucero** 1998-NMSC-044.

21. The Defendant has simply failed to satisfy the three prongs, i.e., the Defendant has not demonstrated any prejudice, has failed to show how the proposed exculpatory information (unknown to the State) would directly negate the guilt of the Defendant, and has failed to show that any proposed "exculpatory evidence" would be admissible at trial. Extensive pretrial hearings were conducted prior to the Grand Jury, and rulings were made as to the presentation of evidence and testimony. The Defendant is not entitled to another chance to litigate evidence before the Grand Jury. **See** § 31-6-11 (A); **State v. Chance**, 29 N.M. 34 at 39 (1923); **See also State v. Yaw**, 2011-NMCA-023.

22. Additionally, it will be instructive for the Court to review the original **Jones v. Murdoch** letter that was litigated on May 12, 2011 and the resultant letter that was submitted to the Grand Jury on May 13, 2011 (initialed by Grand Jury Foreperson). **See**

**State's Attachments 7 and 8.** The Court (J.C. Robinson) reviewed the original letter and redacted/struck many elements/demands from the letter. The letter that was presented to the Grand Jury reflected the Court's rulings. Further, the final **Jones v. Murdoch** letter (prepared by defense counsel) specifically noticed the Grand Jury of Judge Martin's anticipated testimony, i.e., he didn't hear anything inappropriate. The request for use immunity for Judge Martin, then, is unnecessary and superfluous. Judge Robinson also struck the Osborne affidavit from the **Jones v. Murdoch** demand, and the redacted final letter reflected the withdrawal of the affidavit for consideration by the Grand Jury. This is *res judicata*, and not to be disturbed absent a compelling finding of new and/or significant information.

WHEREFORE the State of New Mexico respectfully moves this Court to reconsider its

Order granting in part the Defendant's Motion to Dismiss #3.

Respectfully submitted,

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Matthew E. Chandler  
District Attorney (Special

Prosecutor)

417 Gidding St., # 200  
Clovis, NM 88101-7560  
(575) 769-2246

I HEREBY CERTIFY that a true and correct copy of this pleading was delivered to opposing counsel and the Court this \_\_\_\_ day of September, 2011.



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Matthew E. Chandler, District Attorney