



SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

v.

D-202-CR-2016-00789

DARRIUS DAVON VALLES,

Defendant.

**ORDER GRANTING THE STATE'S MOTION TO APPOINT  
NEW COUNSEL FOR WITNESS DEAMBER YONKER**

**THIS MATTER** came before the Court for hearing on July 13, 2016, on the State's *Motion to Appoint New Counsel for Witness Deamber Yonker* ("Motion"), filed on June 8, 2016, and *Witness Deamber Yonker's Response to State's Motion to Appoint New Counsel* ("Response"), filed on June 16, 2015. Plaintiff is represented by Les Romaine and Mark Probasco. Defendant Darrius Davon Valles ("Defendant") appeared in person and is represented by Mark Earnest. Witness Deamber Yonker appeared in person is represented by Lisa Torraco. The Court, having reviewed the pleadings, file, and arguments of counsel, **FINDS:**

1. On March 23, 2015, prior to Defendant's indictment in this case, Defendant and Yonker were taken into custody based on a traffic stop in Sandoval County.
2. On July 17, 2015, the State filed criminal charges against Defendant and Yonker based on the traffic stop. The State subsequently filed a *nolle prosequi* in Yonker's case. Defendant's case is pending trial.
3. Torraco currently represents Defendant in the Sandoval County criminal case.

4. On March 15, 2016, Defendant was indicted in this case on charges including first degree murder, aggravated battery, tampering with evidence, and escape based on an incident that allegedly occurred on January 15, 2016.
5. On February 12, 2016, Yonker was charged with obstructing an officer based on incidents related to this case. The complaint alleged that Yonker assisted Defendant in evading capture and lied to police about his whereabouts. The State has since filed a *nolle prosequi* in Yonker's case.
6. On April 1, 2016, Earnest entered his appearance on behalf of Defendant in this case.
7. On May 16, 2016, Torracco filed a limited entry of appearance on behalf of Yonker in this case seeking to oppose the State's efforts to require Yonker to appear as a material witness. On Yonker's behalf, Torracco filed a motion for an order of protection, which claimed Yonker had "information not known to the state and to the police that will tend to incriminate [her] and is EXCULPATORY to [Defendant]." The motion stated that Yonker was invoking her Fifth Amendment right to remain silent. As proffered at the hearing on Yonker's motion, the State sought to present Yonker's testimony regarding statements she made during a 911 call shortly after the alleged murder that implicated Defendant as the person who killed the alleged victim as well as subsequent statements made to investigating officers. Also, based on the proffers of counsel, Yonker stated that Defendant shot the alleged victim in self-defense. In support of the motion, Torracco submitted a statement about Yonker's involvement in the case, which the Court reviewed *in camera* and filed under seal. This statement is not available for

review by counsel for the State or Defendant. After the hearing, the Court granted Yonker's motion for protective order.

8. The State seeks to disqualify Torraco from representing Yonker in this case under Rule 16-107 NMRA. *Motion* 1-3. The State argues that Torraco should be disqualified because she currently represents Defendant in another criminal matter and has a conflict of interest. *Id.* The State asserts that because Torraco is representing Yonker in this case and Defendant in separate criminal matters, the rule governing concurrent conflicts, Rule 16-107, applies. *Id.*
9. Yonker, in turn, appears to believe that Torraco's representation of both clients is permissible under Rule 16-109 NMRA, the rule governing representation of former clients. *Response* 3-4. Yonker asserts that there is no actual or potential conflict of interest, but even if there were, the conflict could be waived after consultation. *Id.* Yonker claims that Torraco discussed the need for a waiver with Defendant and drafted a waiver for Defendant to discuss with his current defense counsel in this case. *Id.* 5-6. Attached to Yonker's *Response* is a detailed waiver signed by Defendant and an affidavit from Torraco indicating that both Torraco and Earnest consulted with Defendant about the potential conflicts before Defendant signed the waiver. *Id.* Ex. B & C.<sup>1</sup>
10. "[P]rosecutors do have a duty to disclose, earlier rather than later, potential conflicts of interest." *Rael v. Blair*, 2007-NMSC-006, ¶ 27, 141 N.M. 232, 153 P.3d 657. "The prosecutor's faithful compliance with his or her duty to disclose not only enables the trial judge to evaluate the conflict for purposes of relying on

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<sup>1</sup> Torraco did not submit a waiver for Yonker, although Torraco informed the Court at the hearing on this matter that she would submit one if necessary.



motions to disqualify.” *Id.* ¶ 28. “Compliance with that obligation also enables the trial judge to rule appropriately on waivers.” *Id.*

11. The crux of the rules governing conflicts of interest under the New Mexico’s Rules of Professional Conduct “is that an attorney should not represent a client whose interests are adverse to those of a present client, or whose interests are adverse to those of a former client on a matter that is the same or substantially related to the previous matter.” *In re Stein*, 2008-NMSC-013, ¶ 22, 143 N.M. 462, 177 P.3d 513.
12. “The right to effective assistance of counsel free from conflicts of interest is guaranteed by the Sixth Amendment to the United States Constitution.” *Rael*, 2007-NMSC-006, ¶ 10 (quoting *State v. Sosa*, 1997-NMSC-032, ¶ 20, 123 N.M. 564, 943 P.2d 1017). Apart from competent representation, “an attorney owes his client or her client ‘a duty of loyalty, a duty to avoid conflicts of interest.’” *Rael*, 2007-NMSC-006, ¶ 10 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); see also *State v. Martinez*, 2001-NMCA-059, ¶¶ 23-24, 130 N.M. 744, 31 P.3d 1018 (recognizing that the Sixth Amendment guarantees both the right to counsel of reasonable competence and the right to counsel’s undivided loyalty).
13. Generally, there are two theories that an accused can pursue to establish a violation of the Sixth Amendment right to conflict-free counsel: “either that his attorney had a potential conflict of interest that prejudiced his defense, or that his lawyer had an actual conflict of interest adversely affecting his performance.” *Enoch v. Gramley*, 70 F.3d 1490, 1496 (7<sup>th</sup> Circ. 1995) (internal quotation marks and citations omitted). “Thus, when counsel’s struggle to serve two masters

cannot seriously be doubted, counsel's representation becomes unconstitutional in a manner that is never harmless error." *Martinez*, 2001-NMCA-059, ¶ 24 (internal quotation marks and citations omitted). Although most conflict of interest cases involve counsel representing two clients in the same matter, conflicts of interest are not limited to multiple representation and in fact a conflict may arise when the interests of the client and the attorney diverge. *Id.* ¶ 25. "Although not essential to [the court's] analysis, the adverse effects of actual conflicts can also be demonstrated when some plausible defense might have been pursued but was not because it would be damaging to another's interest." *Martinez*, 2001-NMCA-059, ¶ 33 (internal quotation marks and citation omitted). "Under this standard, plausible defense strategies need not be successful ones." *Id.* (internal quotation marks and citation omitted).

14. This is an unusual case because the State is not seeking to remove counsel for Defendant but counsel for a witness or potential co-defendant. However, under the unique circumstances of this case, the Court has no trouble concluding that Torraco's simultaneous representation of Yonker in this case and Defendant in other criminal matters is fraught with a conflict of interest, as well as a serious potential conflict of interest.
15. The Court's concern about a conflict of interest arises from the fact that Torraco previously represented Defendant in other criminal matters and currently represents him in a pending criminal case in Sandoval County that also involves Yonker. In Torraco's own words, Defendant "is a former and present client, with whom I have a close relationship." *Response Ex. C* at 1. Torraco is now

representing a witness in this case whose interests are adverse to Defendant. Torraco has represented that Yonker may have evidence that is exculpatory for Defendant. However, Torraco sought an order excluding Yonker from testifying in order to protect Yonker from incriminating herself. Thus, the interests of Yonker and Defendant are materially adverse. Moreover, as Torraco acknowledged in the waiver she drafted for Defendant, it is possible that Yonker could testify under an immunity agreement. *Response Ex. B at 1*. Even though Torraco appears to believe that such testimony likely will be exculpatory, *id.*, it appears from the proffers made to this Court that Yonker's testimony could also prove inculpatory for Defendant. Consequently, Torraco is in the position of having divided loyalties as the interests of Yonker are divergent from those of Torraco's current client, Defendant. This constitutes the exact situation the New Mexico Supreme Court cautioned against when it stated that a conflict exists when "some plausible defense might have been pursued but was not because it would be damaging to another's interest." *Rael*, 2007-NMSC-006, ¶ 15 (internal quotation marks and citation omitted). Thus, in rendering advice to Yonker about whether to invoke or waive her Fifth Amendment right to remain silent, Torraco risks taking actions adverse to the interests of her current client, Defendant. Accordingly, Torraco's advice to Yonkers can affect Defendant's interests in, for example, pursuing a theory of self-defense. In addition, if Defendant is convicted in this case, such advice could affect Defendant's interests in his other pending criminal case.



16. Thus, while Torracco maintains that the interests of Yonker and Defendant are not adverse because they are a couple and do not wish to incriminate themselves or each other, *Response 4*, Torracco's belief is not reasonable in light of the adverse interests just discussed. See Rule 16-107(B)(1) (providing that a lawyer may represent a client when a concurrent conflict exists if, among other things, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client").
17. The Court further notes that the existence of a conflict of interest is even more problematic due to Yonker's involvement in the Sandoval County case. Although charges against Yonker were dismissed without prejudice in her related case, it is possible that additional conflicts of interest may arise due to Yonker's involvement in both cases, further complicating Torracco's loyalties. Accordingly, the Court recognizes that conflicts of interest that are not necessarily apparent at this point may become apparent as both cases progress. See *Wheat v. United States*, 486 U.S. 153, 162-63 (1988) ("The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants.").
18. Although the Sixth Amendment includes the right of an accused to select his attorney, the essential aim of the Sixth Amendment is to "guarantee an effective

advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Id.* at 159. “When an accused’s right to counsel is at stake, our courts invoke a presumption against the waiver and loss of that fundamental right.” *Martinez*, 2001-NMCA-059, ¶ 38. “Any waiver of the right to conflict-free counsel must be made knowingly and intelligently, and be clearly shown on the record.” *Id.* It is well established that whether a trial court accepts a waiver of a conflict of interest is purely discretionary. *See Wheat*, 486 U.S. at 164 (“The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.”).

19. In determining whether to accept a waiver, “[c]ourts have the duty to balance a defendant’s constitutional right to retain counsel of his choice against the need to maintain the highest standards of professional responsibility, the public’s confidence in the integrity of the judicial process and the orderly administration of justice.” *United States v. Roach*, 912 F.Supp.2d 1153, 1167 (D.N.M. 2012) (internal quotation marks and citations omitted).

20. This Court has “substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Rael*, 2007-NMSC-006, ¶ 28 (quoting *Wheat*, 486 U.S. at 163).

17. The Court finds that it is not appropriate to accept a waiver of the conflict or potential conflict of interest in this case from Defendant where there is sealed



information before the Court concerning the witness's involvement in the case. Because defense counsel is not privy to that information, he cannot adequately advise Defendant about the nature of the conflict of interest in this case. Accordingly, it is not possible for Defendant to waive any conflict of interest or potential conflict of interest knowingly and intelligently.

### **CONCLUSION**

For these reasons, the State's *Motion to Appoint New Counsel for Witness Deamber Yonker* is **GRANTED**, and Lisa Torracco is disqualified from representing Deamber Yonker as a witness in this matter.

**IT IS FURTHER ORDERED** that unless and until Deamber Yonker retains private conflict-free counsel, the Court will appoint the Law Offices of the Public Defender to represent her in this matter.

**IT IS SO ORDERED.**

  
**BRETT R. LOVELESS**  
District Court Judge, Division III

Copies:

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Mark Earnest  
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