

**SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO**

**CR No. 17-01237**

**STATE OF NEW MEXICO**

**Plaintiff,**

**vs.**

**MUHAMMAD AMEER,**

**Defendant.**

**MOTION TO DISMISS OR IN THE ALTERNATIVE, DISQUALIFY THE 2<sup>ND</sup>  
JUDICIAL DISTRICT ATTORNEY'S OFFICE IN THIS MATTER**

Muhammad Ameer, the defendant, through his counsel, Robert C. Martin, hereby moves this court to dismiss this matter or disqualify the 2<sup>nd</sup> Judicial District Attorney's office from prosecuting this cause and have a special prosecutor appointed.

**FACTS**

1. A key witness in this matter is employed by the 2<sup>nd</sup> Judicial District Attorney's office.
2. On September 6, 2017, she lied to Investigator from the Law Offices of the Public Defender (LOPD) and stated that she was another person when he attempted to serve her with a subpoena at her home to appear for a pretrial interview. See attached Defense exhibit A.
3. On September 11, 2017, she stated to the LOPD Investigator that she was instructed by Les Romaine that she did not have to accept any subpoena and she did not

have to talk to anyone from the LOPD if she did not want to. See attached Defense exhibit A.

4. On October 11, 2017, another investigator from the LOPD attempted service on the witness. He was told that she was not working and her supervisor was identified as Les Romaine. See attached Defense exhibit B.

5. On October 12, 2017, the witness was served and stated that her supervisor told her not to accept the subpoena from the LOPD office. The subpoena was placed on the table in front of her. As the Investigator departed, he turned around and saw Mrs. Fonseca pick the subpoena up. See attached Defense exhibit B.

### **LEGAL ARGUMENT**

The Defendant's due process rights as guaranteed by the Fifth and Fourteenth amendments of the United States Constitution and by Article II, Sections 14 and 18 of the New Mexico Constitution were violated by the obstruction and interference of the prosecutor in the service of a lawful subpoena upon the witness in this matter. This was in part due to the inherent conflict of interest by the witness being employed at the 2nd Judicial District Attorney's office and therefore, wanting to please her employer in this matter.

The Defendant has a right to a fair and impartial trial as a fundamental aspect of the accused not to be deprived of liberty without due process of law. U.S.Const., 5th & 14th Amends. The prosecutor is obligated, as well as of the court, to respect this mandate. *Berger v. United States* (1935) 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314. The prosecutor in this regard is not simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy. The prosecutor is a public

official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. His duties are conditioned by the fact that he is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. Therefore, whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. A prosecutor is in a peculiar and very definite sense the servant of the law. *Berger v. United States* (1935) supra, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 70 L.Ed. 1314; see also *United States v. Cox* (5th Cir. 1965) 342 F.2d 167, 193 (Wisdom, J., concurring).

It is precisely because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality. This is lost if those exercising the discretionary duties of the district attorney are subject to conflicting interests which might tend to compromise the impartiality. A district attorney may thus prosecute vigorously and will be objective and impartial in consideration of each individual case with the fair minded exercise of the prosecutor's discretion requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment. However, the district attorney in this case caused a denial of due process, by the prosecutorial bias formed by the witness being an employee of the prosecutor's office.

In addition, the public has an interest in both the reality and the appearance of impartiality in the prosecution of this matter. As such, the prosecutor must avoid an appearance of impropriety, which the American Bar Association has adopted, in its Standards Relating to the Prosecution Function that provide a prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. The

interplay between the employee witness and the prosecutor has given rise to the appearance of impropriety and a need for a special prosecutor. In conclusion, this conflict of interest, which does prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office as show by the facts herein stated above, does support the disqualification of the 2nd Judicial District Attorney's office.

**WHEREFORE**, Mr. Muhammad Ameer requests this Honorable Court to dismiss this matter or in the alternative, disqualify the 2nd Judicial District Attorney's office from prosecuting this cause and have a special prosecutor appointed.

Respectfully Submitted,



Robert C. Martin, Esq.  
505 Marquette, Suite 120, NW  
Albuquerque, NM 87102  
Phone: 219-2833

This will certify that I caused a copy of the foregoing was emailed and placed in the District Attorney's incoming basket at the time of filing.



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Law Offices of the Public Defender

Judge: CHRISTINA ARGYRES  
Time: 30 minutes



know the answer; further explaining, I was only doing my job and Grace and Richard could ask the attorney issuing the subpoenas that question.

I then asked the woman if she was sure she was not Grace. The woman responded she was not, suggesting I make further attempts on the next evening or maybe during the upcoming weekend. I thanked the woman for her time and I departed the Fonseca residence at that time.

My supervisor, Eileen Chavez, is familiar with Grace Fonseca and she provided me with a physical description for Grace Fonseca. Based on Ms. Chavez's description and the questions the woman was asking me, I believed the woman I had spoken to was probably Grace Fonseca.

I obtained driver license photographs from the New Mexico Department of Motor Vehicles for Richard and Grace Fonseca. After reviewing the photographs, I determined the woman I was speaking to at the Fonseca residence was indeed Grace Fonseca.

I returned to the Fonseca residence several times more over the next couple of days, including on the weekend. I attempted service during the morning hours, mid-day hours and evening hours with no response.

On September 11, 2017 at approximately 3:35 PM, I again attempted service of the subpoenas at the Fonseca residence. This time I spoke with Mr. and Mrs. Fonseca's seventeen year old son Richard Fonseca Jr.

After explaining to Richard Jr. who I was and why I was there, Richard Jr. told me, he is a Senior at Sandia High School and he is on the wrestling team. Richard provided me with his date of birth as, [REDACTED]. Richard Jr. also told me he someday wants to be a Drug Enforcement Agent. Richard Jr. went on to say, he is a 4.0 student and he likes school. I encouraged Richard Jr. to push on towards college, telling him he was doing well.

After explaining to Richard Jr. the subpoenas I had in hand, Richard Jr. told me he witnessed the same incident in question. Richard Jr. told me, his mother told him not to tell the police what he had seen because she did not want him to get involved.

Richard Jr. went on to explain, his father was recently laid off after working construction at the Santa Ana Star Center Construction site in Bernalillo. Richard Jr. added his mother and father were out placing job applications for his father and he was not sure when they would be home.

Richard Jr. volunteered to call his mother to see when they would be home. Using his own cell phone, he called his mother's cell phone putting her on speaker phone so I could hear. When Ms. Fonseca answered the call, Richard Jr. gave his mother my name and explained I was there to serve her and Mr. Fonseca. I let Ms. Fonseca know I was standing by and her son had her on speakerphone. Richard Jr. then handed me his cell phone.

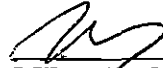
Ms. Fonseca told me, she and her husband were interviewed by the District Attorney's office the previous Friday and the Assistant District Attorney told them, they did not have to speak with the "Public Defender" if they did not want to. Ms. Fonseca told me, she and her husband did not want to speak to anyone from the Public Defender's office.

I explained to Ms. Fonseca I had a subpoena for her and her husband and the documents were supported by the court for service to them. Ms. Fonseca replied, the Assistant District Attorney told them, they did not have to accept any subpoenas and they did not have to speak to anyone from the Public Defender's office if they did not want to. Ms. Fonseca at that time told me she did not want to speak to anyone from the Public Defender and she would not accept any subpoena from the Public Defender.

I asked Ms. Fonseca for the name of the Assistant District Attorney who had given her this advice. Ms. Fonseca replied, the Assistant District Attorney's name is, Les Romaine.

At this time Ms. Fonseca asked me to leave her home and not to return. I thanked Ms. Fonseca for her time and I handed Richard Jr. his cell phone. Richard Jr. then concluded his call with his mother.

I thanked Richard Jr. for his time and I departed the Fonseca residence at that time.

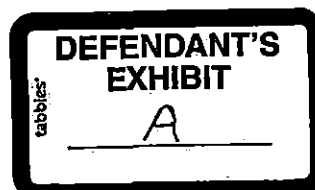
  
\_\_\_\_\_  
**Milton Rodriguez**  
**Investigator**  
**Law Offices Of The Public Defender**

SUBSCRIBED AND SWORN TO before me this 25 day of September 2017

  
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NOTARY PUBLIC

My Commission Expires:

May 25 2019



**Martin, Robert**

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**From:** LaCuesta, Wesley  
**Sent:** Thursday, October 12, 2017 11:01 AM  
**To:** Chavez, Eileen  
**Cc:** Rodriguez, Milton; Swonger, Matthias; Martin, Robert  
**Subject:** RE: Subpoena assistance on a Really difficult prior service - st vs Mahammad Ameer CR 17-1237

Good Morning,

This morning I served subpoenas on Mrs. Kristina Apollonio and Mrs. Grace Fonseca. Notes were entered into CDMS.

Additionally:

Yesterday (10/11/17) I attempted to serve Mrs. Fonseca at the DA's office. The receptionist, Cristien, indicated Mr. Fonseca was on assignment at an off-site storage warehouse. A second receptionist, Jennifer, stated to Cristien that Mrs. Fonseca was a witness to a case the DA's office was handling. Cristien called and spoke with who she claimed to be Mrs. Fonseca's supervisor. After a 15 minute wait, Cristien received a call then advised me that Mrs. Fonseca was off and not at the warehouse and that I could contact Mrs. Fonseca's supervisor for any questions. Cristien identified Mrs. Fonseca's supervisor as Les Romaine.

This morning (10/12/17) at about 7:50 am, I located the warehouse located off Broadway and 2 blocks south of Gibson. The warehouse is located in the voting machine warehouse within a County complex. I waited and served Mrs. Fonseca her subpoena at about 8:15 am. Mrs. Fonseca did not physically accept the subpoena and stated she was an employee with the DA's office and was told by her supervisor that she did not have to accept the Public Defender's office subpoena. Subsequently, Mrs. Fonseca did accept her subpoena, which I placed on top of a table in front of her as I departed.

Please let me know if I may be of any further assistance in this matter.

Wes

