

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

CR No.: 2017-01237

DA File No.: 2017-01574-1

Plaintiff,

vs.

MUHAMMAD AMEER, AKA: AMEER MUHAMMAD,
Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR IN THE
ALTERNATIVE, DISQUALIFY SECOND JUDICIAL DISTRICT ATTORNEY'S OFFICE IN
THIS MATTER

Comes now the State of New Mexico and respectfully files this response requesting that this Court deny the relief sought by the Defendant in his *Motion to Dismiss Or In the Alternative, Disqualify the Second Judicial District Attorney's Office in This Matter*.

FACTUAL/PROCEDURAL BACKGROUND

1. This matter, with the top count of Open Murder was indicted March 31, 2017 as a result of an interaction with the defendant that resulted in the death of Aaron Sieben. Pursuant to LR 2-308, an initial witness list was filed on April 6, 2017 and the defendant was arraigned on April 7, 2017.
2. A scheduling conference occurred on April 20, 2017 and a scheduling order was filed in this case on April 21, 2017. On July 17, 2017 Assistant District Attorney Les Romaine (herein "assigned prosecutor") filed a substitution of counsel and amended witness list which was provided to defense counsel, Robert Martin.
3. Due to a lack of movement in this case in regards to scheduling pretrial interviews

being scheduled and no requests for those interviews made by defense counsel, on August 4, 2017 the assigned prosecutor sent an email to the defendant's attorney of record requesting dates and times of availability to complete pretrial interviews in August and September of 2017. Mr. Martin stated that Matthias Swonger needed to be contacted to coordinate the scheduling of pretrial interviews.

4. The interviews were scheduled on dates and times of availability provided by Mr. Swonger, which was September 8, 11, 13 and 14, 2017. Confirmation of those scheduled interviews were emailed to both Mr. Swonger and Mr. Martin on August 11, 2017. The confirmation included Grace Fonseca as one of the witnesses that was scheduled to appear for a pretrial interview at the Office of the District Attorney. Mr. Swonger requested that those interviews be cancelled. The assigned prosecutor made both Mr. Swonger and Mr. Martin aware that the interviews – which were coordinated to take place on a date of availability provided by the defense – would not be cancelled, and with that information, on August 15, 2017, Mr. Swonger sent notice that they would subpoena the same witnesses to their office.
5. On September 7, 2017, the assigned prosecutor filed a notice of compliance and motion for sanctions due to the conduct of Mr. Martin and Mr. Swonger. On September 11, 2017, Mr. Swonger filed a response to the notice and motion filed by the assigned prosecutor. On September 18, 2017 the court sent a notice of motion hearing which was scheduled on October 19, 2017.
6. As subpoenas were being served by investigators from the Office of the District Attorney, many civilian witnesses raised concerns about having two subpoenas issued to them, for the same incident asking them to appear at two different locations. One of

those witnesses even contacted an attorney to seek advice as to how to handle the situation of receiving two different subpoenas for the same incident.

7. Ms. Fonseca was interviewed by police on March 19, 2017, and clearly stated that she worked at the DA's Office. The police report containing that information was provided to the defense on April 7, 2017, along with several other items of discovery. (See Exhibit #1 line 2099).
8. The defendant mistakenly asserts that Ms. Fonseca is a "key witness." Ms. Fonseca is one of eight civilian witnesses that observed the incident with the defendant that resulted in the death of Aaron Sieben.
9. The defendant falsely states in his motion that the assigned prosecutor is the supervisor of Ms. Fonseca. The assigned prosecutor has never supervised Ms. Fonseca in any capacity during her employment at the DA's Office. Ms. Fonseca is not a prosecutor. She serves in an administrative capacity in the Records Division of the DA's Office assigned offsite, and has no regular contact with the assigned prosecutor.
10. On October 18, 2017, the defendant filed above referenced motion. Although not mentioned in the defendant's motion, a main point of contention in this litigation is the defendant's compliance with LR2-308, and the defense filed this motion with full awareness that LR 2-308 is exclusive to Bernalillo County, New Mexico, and that other prosecutorial agencies within New Mexico are likely to be unfamiliar with the local rule.
11. Within the defendant's motion, he relies on information alleged to have been known by defense counsel since September 6, 2017, and notarized September 25, 2017,

along with an internal email asserting that the assigned prosecutor was the supervisor of the witness and advised her to not speak with the “Public Defender.” The defendant nonetheless waited until October 18, 2017, to file the instant motion.

ARGUMENT

The defendant bears the burden of persuasion to first disqualify an assistant district attorney based on the appearance of unfairness or impropriety before the burden shifts to the State to prove that, based on effective screening methods, those reasons do not rise to the level requiring the entire district attorney’s office to be disqualified. *State v. Gonzales*, 2005-NMSC-025, ¶¶ 28, 30, 138 N.M. 271 (quoting *State v. Pennington*, 1993-NMCA-037, ¶¶ 18-19, 115 N.M. 372). The defendant bears the burden of establishing that the prosecutor’s participation in the case “is inconsistent with a particular standard of professional conduct, justifying disqualification of that person.” *Id.* ¶ 28. The New Mexico Supreme Court has cautioned that “[d]isqualification of a prosecutor should remain a rare event; disqualification of an entire office even more so.” *Id.* ¶ 51.

I. There are no grounds to warrant a disqualification of the assigned prosecutor.

The defendant has not alleged that the assigned prosecutor has any personal involvement in this case or any personal knowledge of the underlying facts. Nor has the defendant alleged that the prosecutor’s participation in this case is inconsistent with any standard of professional conduct. Instead, the defendant alleges that the assigned prosecutor has a “bias” due to a witness’s employment at the DA’s Office.

The defendant’s assertion of bias is meritless. Bias, in the context of disqualification, means a personal interest in the outcome of a case “that creates an opportunity for conflict or other improper influence on professional judgment.” *Gonzales*, 2005-NMSC-025, ¶ 39. The

defendant has alleged no personal relationship between the assigned prosecutor and Ms. Fonseca, and his assertion that the assigned prosecutor supervises Ms. Fonseca is false. Further, Ms. Fonseca has absolutely no involvement in this prosecution. Essentially, the defendant argues that Ms. Fonseca's employment by the DA's Office alone should be grounds for disqualification. This argument is contrary to established law. "It is well settled that merely because an employee may be a potential witness and credibility of that witness may have to be argued by the prosecuting attorney, there is no sufficient basis for that reason alone to recuse an entire prosecutorial office." *People v. Merritt*, 24 Cal. Rptr. 2d 177, 181 (Ct. App. 1993); accord *State v. Robinson*, 2008-NMCA-036, ¶ 22, 143 N.M. 646 (concluding an assistant district attorney's knowledge of the defendant's threat against another assistant "does not constitute disqualifying information or create a presumption of unfairness"). This is true even if the witness is a prosecutor in the office, and even at a supervisory level. *Merritt*, 24 Cal. Rptr. 2d at 181. Here, Ms. Fonseca is not prosecutor, and she has no influence on the prosecution of the case. Her employment status does not create a disqualifying bias.

Moreover, as the defendant's attachment shows, the defendant's complaint is not about any inherent conflict of interest but about litigation conduct. The defendant's Exhibit A shows that witnesses received multiple subpoenas. This occurred due to the defendant's failure to comply with the local rule and bad faith in refusing to attend a pre-trial interview on a date chosen by the defense itself. The State vehemently denies any interference by the assigned prosecutor with the service of the subpoena. But even the general issue of multiple subpoenas is one of the defendant's own creation. The New Mexico Supreme Court has stated in clear terms that "a defendant's conduct will almost never be sufficient to disqualify a member of the prosecution team, unless the crime being prosecuted was committed against the prosecuting

attorney or someone else involved in the prosecution.” *Gonzales*, 2005-NMSC-025, ¶ 29.

Effectively, the defendant is attempting to manufacture grounds for disqualification by his own litigation misconduct, and it seems plain that the reason for doing so is to inject delay into these proceedings and to divert attention away from his violation of the local rule.

The defendant provides this Court with no authority to support his motion, and New Mexico cases concerning disqualification refute his arguments. In *Pennington*, an investigator previously worked on the defendant’s case prior to the first trial, before being employed at the district attorney’s office prior to the second trial. The New Mexico Court of Appeals found that a defendant could meet its burden to disqualify a member of the district attorney’s staff if that staff member had previously worked for the defendant on the same matter. *Pennington*, 1993-NMCA-037, ¶ 18. The disqualification of the investigator was proper because confidential information was learned while preparing for the defendant’s first trial. Unlike *Pennington*, the assigned prosecutor and members of the prosecution team in this case have no confidential information about the defendant.

Disqualification may also be proper where “the prosecutor has a prior or current relationship with the defendant that either made the prosecutor privy to relevant, confidential information or where their relationship has created an interfering personal interest or bias.” *Robinson*, 2008-NMCA-036, ¶ 22 (citation omitted). In the instant case, the assigned prosecutor has neither worked on a previous case for the defendant from the defense side nor had a relationship with the defendant in which confidential information would have been disclosed. The assigned prosecutor has not had any conversations with any previous prosecutor of the other previous matters and would, therefore, not be aware any confidential information shared by the defendant, if it exists. The first time this prosecutor heard about the defendant was when the

case was transferred to him on June 25, 2017, and began to prepare the case for trial. The assigned prosecutor has no knowledge about the defendant other than the facts of this case and his criminal history, which is a matter of public record.

In regards to Ms. Fonseca, the assigned prosecutor has not had any discussions about how she should interact with opposing counsel nor has he supervised her in any capacity within the DA's Office. Specifically when Ms. Fonseca arrived for her pretrial interview on September 8, 2017, which was scheduled based on the availability provided by defense counsel and which confirmation was sent to defense counsel, she asked why she was being subpoenaed by both the DA's Office and the Law Office of the Public Defender about the same case on different dates at different locations; the assigned prosecutor simply stated that he had no idea why the defense would serve another subpoena for the same incident even though they were aware this scheduled interview about which they were notified. Ms. Fonseca then asked what she should do, and the assigned prosecutor simply stated he could not provide legal advice to her and that ultimately it was up to her as to what she wanted to do. The defendant cannot show an appearance of impropriety or unfairness to warrant disqualification of assigned counsel or as a result of Ms. Fonseca's employment at the District Attorney's Office.

II. Because the defendant cannot make a showing of unfairness or impropriety, the disqualification of the entire Second Judicial District Attorney's Office is improper.

When a defendant fails to establish a basis for a prosecutor's disqualification, there is "no reason for the [D]istrict [C]ourt to require the State to demonstrate that proper screening was in place." *Robinson*, 2008-NMCA-036, ¶ 28. In this case, the defendant has not met his burden. Thus, disqualifying the entire Second Judicial District Attorney's Office – a highly rare event – is unwarranted.

However, if this Court were to find that the defendant has met his burden to disqualify the assigned prosecutor, disqualification of the entire office is not appropriate because appropriate screening methods exist. *See Pennington*, 1993-NMCA-037, ¶ 21. The Second Judicial District Attorney's Office has adequately screened those staff members handling the prosecution of the defendant from those staff members handling the prosecution of the case in which the defendant is a victim. This case is being prosecuted within the major crimes division, while the witness works in an entirely different division; she even works at an offsite location. Further, the assigned prosecutor does not work directly with Ms. Fonseca. There is no danger that any disqualifying bias "will taint the remaining attorneys in the office or will give the appearance of impropriety by to continued prosecution by other attorneys." *Robinson*, 2008-NMCA-036, ¶ 28.

CONCLUSION


This motion appears no more than an attempt to further delay these proceedings and gain a tactical advantage in this case, as evidenced by the defense's failure to request pretrial interviews until being prompted by the assigned prosecutor and the defense's failure to attend interviews scheduled on a date chosen by the defense. Moreover, it appears that the defense may be seeking to gain an unfair tactical advantage by having the case transferred to a district attorney's office that lacks familiarity with LR 2-308 and may be unable to seek enforcement of the defense's obligations under the rule.

The Second Judicial District Attorney's Office has effectively screened the staff members handling the prosecution of this matter from the witness employed by the office. These measures have prevented any conflict of interest or bias and have dissipated any potential taint to the assigned prosecutor. Thus, there should be no disqualification of the assigned

prosecutor and no disqualification of the entire office.

Based on the above analysis, the State respectfully requests that the Court deny the Defendant's *Motion to Dismiss Or In the Alternative, Disqualify the Second Judicial District Attorney's Office in This Matter.*

Respectfully Submitted,


LES ROMAINE
ASSISTANT DISTRICT ATTORNEY
520 Lomas Blvd. NW
Albuquerque, NM 87102

This will certify that on

October 27, 2017,

a copy of the foregoing was sent to
counsel for the Defendant,
Robert Martin and Matthias Swengel
Albuquerque, New Mexico.


Assistant District Attorney