

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

FILED
2nd JUDICIAL DISTRICT COURT
Bernalillo County
7/18/2019 3:26 PM
James A. Noel
CLERK OF THE COURT
Cassandra Cruz

No. CR 18-04094

STATE OF NEW MEXICO,

Plaintiff,

vs.

SCOTT BACHICHA,

Defendant.

MOTION TO DISQUALIFY THE 2ND JUDICIAL DISTRICT ATTORNEY

Defendant by and through counsel undersigned, moves this court to disqualify the 2nd Judicial District Attorney's Office from prosecuting this case since John Duran, one of the supervising attorneys in this office and on this case, is a material witness.

1. Mr. Bachicha was charged initially with first degree murder and tampering with evidence for the accidental shooting of his long-time girlfriend Mindy Stuart, and now the State re-indicted him with involuntary manslaughter (firearm enhancement) and tampering with evidence for the same incident.
2. This motion, along with several others, was pending at the time the State filed a *Nolle Prosequi* of the first indictment, CR-17-1625—just four (4) days before the court hearing on the pending motions was set.
3. At a pretrial interview on January 11, 2018 of David Baca, the brother of Ms. Stuart, he said:
 - a. Ms. Stuart told him on the morning of April 16, 2017, the date of incident, that she had been receiving threatening phone calls from a woman who claimed she (Stuart) was with her man;
 - b. Ms. Stuart told him on the same date that if something happens to her, it

was either Scott or his sister who did it.

- c. He told the prosecutor (John Duran—the assigned prosecutor at the time of the Baca interview; now, the supervisor of the current prosecutor), during a meeting with the family a few months before the pretrial interview, the two (2) statements listed above.
4. David Baca is a listed witness in this case. (See state's witness list filed December 12, 2018)
5. John Duran was not present for the David Baca pretrial interview—a substitute prosecutor attended the interview.
6. After the interview with David Baca finished, Mr. Duran arrived (on the same date).
7. Both defense counsel and Chris Dodd (co-counsel for the defense at the time) asked Mr. Duran:
 - a. Did anyone ever tell you that Mindy Stuart had been receiving threatening phone calls from woman claiming Stuart was with her man? Mr. Duran said "no."
 - b. Did anyone ever tell you that Mindy Stuart said that if something happened to her, it was Scott or his sister? Mr. Duran also said "no."
8. Defense counsel and Mr. Dodd then told Mr. Duran that David Baca had said he (Baca) had told Mr. Duran these statements. Mr. Duran confirmed he had met with the family previously. Mr. Duran then said, he "did not recall" David Baca telling him either of these statements.
9. These alleged statements by Mindy Stuart had never been disclosed—they are not documented in any of the hundreds of pages of discovery or hours of recordings.
10. In fact, lead detective Andrea Ortiz testified previously on April 24, 2017 that an upward shot trajectory would match and is consistent with Mr. Bachicha's statement that this

shooting was accidental. The investigation (criminalistics and OMI) revealed an upward trajectory of as much as 19 degrees.

11. Mr. Duran now is a *Giglio* witness, who will impeach David Baca. Mr. Duran is a

necessary witness. His testimony is directly related to the credibility of David Baca—a key witness in this case.

12. Mr. Bachicha is entitled to *Giglio* evidence and has the constitutional right to present Mr. Duran's testimony. The defense has a fundamental, constitutional right to present a defense, which includes presenting witnesses and evidence:

"A basic tenet of American jurisprudence is that a defendant is entitled to a fair trial with the right to appear and defend himself. U.S. Const. amend. XIV; N.M. Const. art. II, §§ 14, 18. Moreover the prejudice which must be raised in a case such as his is minimal. No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant." *March v. State*, 1987-NMSC-020, ¶ 10.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

"A criminal defendant has a fundamental right under the Due Process Clause of the United States Constitution to present his own witnesses to establish a defense." *State v. Rosales*, 2004-NMSC-022, ¶ 7.

13. Given that Mr. Duran will be called at trial, no lawyer from his office can remain on the case.

RULE 16-307. LAWYER AS WITNESS

A. Necessary Witnesses. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on

the client.

B. Associate Lawyer. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 16-107 or Rule 16-109 of the Rules of Professional Conduct.

14. By imputation, his entire officer is disqualified pursuant to NMRA 16-110 ("Imputation of Conflicts of Interest; General Rule").
15. Mr. Duran's office cannot remain on the case because his testimony is exculpatory and detrimental to his client's (i.e. the State of New Mexico) case. Moreover, he is the supervisor of currently-assigned prosecutor.

This motion is brought pursuant to NMRA 5-120, and is based the defendant's rights to due process of law, confrontation of the witnesses, and right to a fair trial, as guaranteed by Article 2, Sections 10, 12, 14, 15, 18 of the New Mexico State Constitution, and the 5th, 6th, and 14th Amendments to the United States Constitution, in addition to NMRE Rules 103(c), 104(a), 402, 403, 404, 513, 615 and 803.

This will certify that a copy of the foregoing was placed in opposing counsel's incoming basket upon filing.

/s/ Raymond Maestas

Defense Counsel

Respectfully submitted:

/s/ **Raymond Maestas**

Raymond Maestas
505 Marquette NW #120
Albuquerque, NM 87102
Phone: 219-2827

Assigned Judge: Ramczyk
Time: **special setting requested**

