

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

FILED IN MY OFFICE  
SECOND JUDICIAL DISTRICT COURT  
BERNALILLO COUNTY, NM  
JAMES A. NOEL  
6/12/2017 1:39 PM  
BRITTNEY MUNOZ

**STATE OF NEW MEXICO,**

**Plaintiff,**

**v.**

**No. CR 2016-00789  
DA 2016-01172-1**

**DARRIUS DAVON VALLES,**

**Defendant.**

**RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE HEARSAY TESTIMONY OF  
DEAMBER YONKER**

COMES NOW, the State by and through its Assistant District Attorney, Les Romaine, hereby responds to the Defendant's Motion to Exclude Hearsay Testimony of Deamber Yonker and hereby requests the Court deny said motion and as grounds for hereby **STATES:**

**STATEMENT OF FACTS**

1. On March 15, 2016 the defendant was indicted on an Open Count of Murder, Aggravated Battery (Deadly Weapon) (Firearm Enhancement), two counts of Tampering with Evidence and Escape from a Community Custody Release Program.

2. On April 18, 2016, the Court entered a scheduling order pursuant to LR 2-400 (now LR 2-308) (G)(3)(c), which included a pretrial interview deadline of February 3, 2017.

3. Per request of defense counsel, witness interviews were scheduled on May 17, 2016, which included a specific time for DeAmber Yonker (witness) to appear.

4. The witness was personally served with a subpoena on April 13, 2016 to appear for a pretrial interview scheduled on May 17, 2016 at 10:00 a.m. Based upon the advice of counsel, the witness did not appear for her pretrial interview.

5. On May 16, 2016, Lisa Torracco emailed a copy of a limited entry of appearance and a motion captioned as "Notice of Non-Appearance and Motion for Order of Protection" which stated amongst other things, that the witness would not appear despite the fact that she was properly served with a subpoena.

6. On May 17, 2016, the witness did not appear as ordered by the properly served subpoena and as a result of her failure to appear, the state filed a motion for a material witness warrant. After the June 6, 2016 hearing the court denied the state's motion for material witness warrant and granted a motion for protective order on behalf of the witness after it reviewed a statement "in camera" prepared by Lisa Torracco. Within that order, the court stated that "Deamber Yonker's statement will not be taken".

7. On June 8, 2016, the state filed a motion to appoint new counsel for the witness due to a conflict of interest between Lisa Torracco representing both DeAmber Yonker and Darrius Davon Valles based on previous and simultaneous representation in regards to this pending matter. On June 16, 2016, the witness filed a response to the state's motion through her counsel, and after hearing on July 13, 2016, the court granted the state's motion and disqualified Lisa Torracco from representing DeAmber Yonker. Within the court's order, the Law Office of the Public Defender was appointed to represent DeAmber Yonker.

8. On September 1, 2016, Brittany Maldonado filed an entry of appearance on behalf of DeAmber Yonker.

9. On March 16, 2017, the defense filed a motion to exclude the testimony of DeAmber Yonker which was not granted.

10. On March 22, 2017, the state filed a motion for an order compelling testimony and granting use immunity for the witness. Also on March 27, 2017, the appointed attorney for the witness filed a motion to provide access to sealed document and disclosure for the materials utilized

by previous counsel in an attempt to represent the witness.

11. On April 3, 2017, the court issued an order to appear for previous witness counsel to appear at an April 17, 2017 hearing and tasked the state with serving the witness with notice of that hearing date. On April 20, 2017, previous counsel filed a response to that order, but it was dropped of the date of the hearing for all parties to view, including the court.

12. At that hearing, the court granted the state's motion for an order granting use immunity, requested the state to file a written motion for a material witness warrant for the witness, and denied appointed counsels motion to provide access to sealed document and compel disclosure.

13. On May 5, 2017, the court granted the state's request for a material witness warrant which was filed April 18, 2017.

14. On May 31, 2017, the defense filed a motion to exclude hearsay testimony of DeAmber Yonker.

15. Between February 29, 2016 through March 30, 2017, the defendant has made thousands of phone call from the Metropolitan Detention Center (MDC) to the witness, DeAmber Yonker. These phone calls were not only made using his individualized pin number, but he also used pin numbers of other inmates to complete those phone calls, which appeared to be an attempt to conceal his actions. These various phone calls were made to various numbers directly to DeAmber Yonker in an attempt to influence her testimony and participation in the prosecution of his homicide. These conversations also make reference to advice the defendant stated he obtained, presumably, from an active member of the New Mexico State Bar.

16. An audio CD containing these specific phone calls are attached as State's Exhibit A. Any specific statements will be referenced to the call contained in State's Exhibit A as A1; A2; etc.

17. On March 12, 2016 @ 10:42:52, state's A-1, the defendant made a call to the witness and the following exchange began at 5:59 into the call:

**Defendant:** "You just gotta say that a motherf\*\*ker was lying about that day"

**Witness:** "O I know, um I already, I can't remember, but I already talked to your uh aunty christina and she came up with the with the perfect story."

After some further discussion the following exchange began 6:36 into the phone call:

**Defendant:** Like a motherf\*\*ker says if I can't have you, no one can, type shit, you feel what I'm talking about? You have to understand what I'm saying, don't be stupd right now, okay, I don't want to talk too much. But you know, you know how motherf\*\*kers feel, like, you know motherf\*\*kers were arguing earlier, like you know, basically all the shit we've been through, all the sh\*t I put you through, whoopty woo, you know that day we, you something happened, a motherf\*\*ker was mad because we was fighting, remember?

**Witness:** Yeah, we were, I had just gotten my hair done.

**Defendant:** an you caught me cheating, right, you know what I'm saying, you know, a motherf\*\*ker, a motherf\*\*ker was heard that f\*\*k it, a motherf\*\*ker was heard, because I was having a child, you know what I mean, you remember?

**Witness:** Yeah

**Defendant:** So a motherf\*\*ker heard some things and a motherf\*\*ker left and you just came up with this idea that if I can't have you, nobody can have you, you get what I mean?

**Witness:** Yeah

**Defendant:** a motherf\*\*ker put it on the paper, got get it notarized, at Kathy's or some notary place and just make a copy and send it to me and then you keep two copies yourself.

18. On March 16, 2016 @ 9:38:35, state's A-2, the defendant calls the witness and the following exchange occurs beginning at 1:25 into the phone call:

**Witness:** I just don't want to be a part of this

**Defendant:** Babe, what are you a part of?

**Witness:** This, I like just don't want, I don't know

**Defendant:** What?

**Witness:** I just don't want it to be my fault or whatever

**Defendant:** How is something gonna be your fault?

**Witness:** I'm just saying

**Defendant:** I'm asking you, what makes you think it gonna be your fault, the only way it's gonna be your fault is if you go up there and you point at me and you do all that sh\*t, is that what

you plan to do? No, so then how's it gonna be your fault?

Later into the phone call beginning at 2:24 the following exchange occurs:

**Witness:** I'm scared, I'm not saying like, it has nothing to do with me like telling, pointing fingers like none of that, I just don't, I just feel like I have a big part to do with this and I just don't want to be the reason, you know or people sayings it's DeAmber's fault why he got, you know

**Defendant:** Okay, let me just tell you this, look a motherf\*\*ker can't be nobody's fault if I told you what to do but mine, in all reality a motherf\*\*ker should have made ol girl come with me and we probably would have been alright, like I'm gonna go all the way with this unless they give me something cool

**Witness:** Yeah

**Defendant:** So therefore, I'm saying the only reason why I'm having doubts and sh\*t like that because you might get into a little bit of trouble, is what I'm saying. I mean, I'm just gonna be real f\*\*k lying, f\*\*k all that sh\*t, it is what it is, you're not gonna be in here for what I'm sitting here going through, but sh\*t f\*\*k its not gonna be something that a motherf\*\*r could hold you forever and you have money in that safe and if anything ever happens you can get out"

This discussion continues for the duration of this phone call.

19. On March 16, 2016 @ 9:55:22, state's A-3, the defendant calls the witness and after spending most of the conversation proving her with pointers on "how to disappear" along with potential hiding spots and reassuring her that law enforcement was scaring her if she went to jail that it wouldn't be for long, the following conversation occurred beginning at 12:47 into the phone call:

**Defendant:** Like I said, I can only say so much but whenever a motherf\*\*ker people come see me over here then you know what I mean?

**Witness:** Yeah, I just seriously need to hurry up and get a lawyer

**Defendant:** Yeah, once I be able to talk more and sh\*t like that, then everything will be okay

**Witness:** Yeah, and we'll know what to do

**Defendant:** And a motherf\*\*ker could coach you and sh\*t, you know what I mean?

**Witness:** Yeah and that's what the other guy was saying, he's like uh well the one un, the one that Tyria said no to, uh when he was talking to me because I told him uh, well he was just like no, we'll tell you what to say, we'll tell you what to say and I'm just like I told them like okay if you tell

em what to say, then, I'm like I just don't want to be the reason, you know?

**Defendant:** Yeah

**Witness:** Like I just don't, I don't want

**Defendant:** But even though, okay I'm like motherf\*\*kers we understand, a motherf\*\*ker might have to sit down for a minute, like you know what I mean, it makes it look like, look worse if a motherf\*\*ker, like that's all it is, that all they want, a motherf\*\*ker to go and they expect us to fight, they want you to go all whoopity woo and you know what I mean, no, if its not like that then there's not much they can prove so they'll just try to hit me with pleas and scare me, whoopity woo, you know

**Witness:** Yeah, as long as we stay solid with each other

**Defendant:** Yeah, that's all that matters, it will, it's understood and doesn't need to be explained, I love you and you love me

**Witness:** Ridin to the end

**Defendant:** Yeah, don't question and don't double think if you are don't think about that

**Witness:** Jamaica said if, Jamaica said if the bitch go missing, then what? They ain't no case

**Defendant:** And tell her that's what we're talking about

20. On March 21, 2016 @ 11:13:11, state's A-4, the defendant called the witness and the following conversation occurred beginning at 5:00 into the phone call:

**Defendant:** It wasn't bad though, I'm pretty sure' I think I got a good chance, you know what I mean about getting back because I told them that I have a two year old son, you know what I mean and he got a liver transplant, you know what I mean

**Witness:** Yeah

**Defendant:** and then I like told them, I told them um, if maybe can put me on the bracelet and sh\*t

**Witness:** and I know like you know people keep saying that's the only part you f\*\*ked up on, cutting the bracelet off and I'm just like no one would have known, you know everything just happened too fast

**Defendant:** I don't know, but I really want you to do what I asked you to do, but you don't have to, but it will look better whenever I file

**Witness:** He's supposed to call me, we're supposed to meet sometime next week

**Defendant:** Oh yeah that, well talk to him about that, but I'm talking well I need to talk to him too. I need to call him but, I was talking about that other thing I told you to get notarized, you

remember

**Witness:** Oh yeah

**Defendant:** I just don't want them to try to come back and be like you know, hit you with a.....it's only, that's only a year if you that, then you know what I mean a motherf\*\*ker will only be facing a year, sh\*t they'll do probation, you know what I mean?

**Witness:** Yeah

**Defendant:** So that's what they'll probably do, but if you do do it you get it notarized and just say, you don't have to say you know, you can be just like, you can put you on this day whoopty woo, I was on xanax bars and I may, you know what I mean and I don't want to deal with this case no more and you know, I'm saying that I lied and that's it and I'm moving out of town, something like that, you know what I mean?

**Witness:** Who do I go to for that?

**Defendant:** I think you just put it on a paper and then you get it notarized, but I don't know if you can get an affidavit paper but that will f\*\*k em all the way up, you know what I mean? That's why they keep not wanting me to, you know speak to the victim, I mean, you know I guess to the witnesses and whoever, but I'm like

**Witness:** Yeah

**Defendant:** I already know whose team she's on, you know what I'm saying, it's just like, either way, that's why I'm like that's why they hit me with all three of them, because if they can't get me with first degree, then they're gonna try to get me with second degree and if they can't get me with second degree, then they'll try to get me with manslaughter

**Witness:** Oh my God

After further discussion, the defendant mentions to the witness that a person named "BK" went to see him and the following exchange begins at 8:05 into the phone call:

**Defendant:** He was just telling me, you know like she f\*\*ked up up but the police probably scared her, you can even say that, you feel me? Like you just, you know they kind of painted a picture and you went along with it because you didn't know what to do and then also you were mad at me because you caught me cheating, I'm telling you, it will work

**Witness:** I know, I just need to, so do I have my mom, do we type it?

**Defendant:** Don't tell your mom because she'll try to talk you out of it

**Witness:** Okay, do I need to type it?

**Defendant:** Naw

**Witness:** and sign it?

**Defendant:** You can hand write it, sign it then you know and the reason why you get it notarized it to say like you have a witness therefore its like an official paper, you know what I mean?

**Witness:** Yeah

**Defendant:** You're basically saying that you lied and then you just say you're not gonna cooperate and then you send me a copy and send me copies or you can keep one, but you send you two copies, you send me two copies and you go to the DA's office downtown and you give em and I got the DA's name and sh\*t too

**Witness:** Yeah

This conversation continues with the witness raising concerns about getting into trouble and the defendant assures her that a contempt of court charge is only a year.

21. On March 23, 2016 @17:09:21, state's A-5, the defendant called the witness and the following conversation occurred beginning at 6:61:

**Defendant:** Lisa came to see me

**Witness:** Oh really, what did she, I was gonna text her

**Defendant:** She wants \$13,000

**Witness:** to start?

**Defendant:** Yep, but she came in here like, she pulled out all my paperwork, she was like you remember when I told you we couldn't beat this one, she was like I could beat this one, I could beat this one and I could beat the murder, she said the only thing we'll have a problem with is, she said I gotta work a deal, you give me \$13,000, I'm gonna ask for a plea, I said well what's the plea and she said Escape from CCP, I said oh well that's nothing, sh\*t I got hope  
After some additional conversation, a short pause and additional conversation at 9:52, the defendant says the following:

**Defendant:** She was like well you know if DeAmber leaves town for six months and they can't subpoena her, it will be an easy case to win.

22. On October 13, 2016 @9:40:18, state's A-6, the defendant called the witness and asked her to call Lisa, so a three-way phone call was completed and at 5:00 into the phone call a discussion was had between the three and at 6:41 the defendant was provided the following reminder from Lisa:



**Lisa:** Remember that they're tape recording all your phone calls, whether its your PIN number or not

**Defendant:** I already know

23. On March 29, 2017 @ 18:00:26, state's A-7, the following conversation began at 2:54 into the phone call:

**Defendant:** On the 17<sup>th</sup>, they're trying to subpoena somebody and if they don't show up, they can't place me at the scene, you know what I mean?

**Witness:** Yeah

**Defendant:** So basically in two and half weeks if this person doesn't show up, then it's gonna be hard for them to place me on the scene and it probably, you know it's a wrap

**Witness:** Oh, okay, well yeah that's

Ultimately the defendant goes on to tell the witness that if she got excluded then its "a wrap".

24. Prior to suppression the Court must find a violation of the rule through an act of either party.

25. The defendant has a right to confrontation based on the Sixth Amendment of the United States Constitution, however a defendant can forfeit his right to object to the use of out-of court testimonial statements against him that would otherwise be inadmissible if the defendant causes the unavailability of the witness by some form of wrongdoing.

## ARGUMENT

26. The Defendant for all intents and purposes is claiming a discovery violation based on the Court's Scheduling Order presumably pursuant to LR2-400 (now LR 2-308) and requesting the sanction of suppression. Before a sanction is appropriate the Defendant has the burden of proving the State committed a violation. *State v. Foley*, 2013 WL 6146050 (N.M. App.) (Unpublished).

27. "Witnesses are not parties and should not be partisans; they do not belong to either side of the controversy; they may be summoned by one or the other or both, but are not retained by either." *State v. Cooley*, 1914-NMSC-035, ¶ 42, 140 P. 111, 1116 quoting *State v. Papa*, 32 R.I. 453, 80 Atl. 12. While *Cooley* case is more than a century old it remains binding precedent and it remains

a powerful statement on the proper place of witnesses in criminal litigation. The Defendant requests, without any proper legal support, that the State be punished by excluding witnesses when there is no action on the part of a party in this case that indicates a failure to comply with LR 2-400 (now LR 2-308) nor any deprivation of Defendant's constitutional right to due process.

28. Assume arguendo, that the Defendant is able to establish a discovery/scheduling order violation, suppression would be improper. Pursuant to LR2-400 (now LR 2-308) if a party fails to comply with the Court's scheduling order the Court should order the appropriate sanctions under the circumstance. "Extreme sanctions such as dismissal are to be used only in exceptional cases. ... [L]ike outright dismissal [with prejudice] of a case, the exclusion of witnesses should not be imposed except in extreme cases." *State v. Harper*, 2011-NMSC-044 at {16} and {21} (internal citations omitted). The Court must determine the cause of the failure.

29. The Confrontation Clause bars the use of out-of-court statements made by witnesses that are testimonial, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine, regardless of whether such statements are deemed reliable. *State v. Romero*, 2007-NMSC-013, ¶ 6. However, a defendant can forfeit his right to object to the use of out-of court testimonial statements against him that would otherwise be inadmissible if the defendant causes the unavailability of the witness by some form of wrongdoing. *State v. Maestas*, 2014 N.M. App. Unpub. LEXIS 253. New Mexico thus requires the State to prove that, by a preponderance of the evidence, the defendant both caused the witness's unavailability and intended that the witness be unavailable. *Id.* The elements to apply are: 1) the declarant was expected to be a witness; 2) the declarant became unavailable; 3) the defendants misconduct cause the unavailability of the declarant; and 4) the defendant intended by his misconduct to prevent the declarant from testifying.

30. The defendant specifically told the witness not to cooperate, get a false statement notarized, hide, and to seek legal advice to "coach" her in what to say. These extraordinary steps taken by the defendant were aided by an attorney. On August 18, 2016, this Court disqualified Lisa

Torraco from representation of the witness in this case but there was continuous contact with the witness and defendant which is captured on a phone call made on October 13, 2016 and again on April 17, 2017 which is captured in a filed "Response to Order".

31. The declarant, DeAmber Yonker, was expected to be a witness in this matter, which is evidenced by the 911 call she made at or near the time of this crime, her statement to police and the extensive litigation that has been tied to her testimony.

32. The declarant, DeAmber Yonker, became unavailable which is evidenced through her not appearing at any court proceedings, actively avoiding service of a subpoena which ultimately led to the issuance of a material witness warrant for her arrest, her being featured on Crime Stopper billboards, until her capture by law enforcement on June 7, 2017.

33. The multiple discussions that the defendant had directly with the witness caused her to become unavailable to testify in the above referenced matter.

34. The defendant intended that through his misconduct to prevent the witness from testifying which was clearly stated on multiple instances.

35. The defendant cannot benefit from his actions in this matter by having any hearsay statements made by DeAmber Yonker suppressed.

36. Based on the defendant's conduct, he has forfeited his right to confrontation of this witness and he cannot benefit, therefore the motion should be denied outright and the Court should allow any out-of-court statements made by DeAmber Yonker to APD Dispatch and to police to come in as substantive evidence due to the acts of the defendant.

37. Due process and confrontation rights attach at trial, discovery was provided which places the defense in a position to anticipate, cross examination or impeach any of the witnesses it seeks to exclude and effective/ineffective assistance of counsel is typically determined after trial.

## CONCLUSION

The State is in compliance with LR2-400 (now LR 2-308) and the Court's Scheduling Order

and the Defendant has failed to prove otherwise. Thus, any sanction against the State would be improper.

**WHEREFORE**, the State request the Court deny Defendant's Motion to Exclude Hearsay Testimony of Deamber Yonker outright as the Defendant has forfeited his right to confrontation due to his misconduct. Further, the State requests that any statements DeAmber Yonker has made to law enforcement be entered as substantive evidence in this matter.

**Respectfully Submitted,**



Les Romaine  
Assistant District Attorney  
520 Lomas Blvd. NW  
Albuquerque, New Mexico 87120

I certify that a true and correct copy of this pleading was provided to defense counsel on this 12<sup>th</sup> day of June, 2017

  
Les Romaine

