

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

STATE OF NEW MEXICO,

Plaintiff,

v.

CR 2008-3350

CLIFTON BLOOMFIELD,

Defendant.

DEFENDANT BLOOMFIELD'S EMERGENCY MOTION TO DISMISS BASED ON PROSECUTORIAL MISCONDUCT, REQUEST FOR SANCTIONS AGAINST DA BRANDENBURG AND MOTION TO REMOVE SECOND JUDICIAL DISTRICT ATTORNEY'S OFFICE FROM PROSECUTING THIS CASE DUE TO CONFLICT

COMES NOW Defendant Clifton Bloomfield, through his attorney of record, and moves this Court to dismiss the charges against him based on extreme prosecutorial misconduct. In the event the Court declines to sanction the State by remedy of dismissal, Defendant maintains that District Attorney Kari Brandenburg's conduct was so egregious as to deny him due process and because members of her office will be called as witnesses, she created a conflict for her and her office, such that this case should be removed from prosecution by the Second Judicial District Attorney's Office.

AS GROUNDS THEREFOR, Defendant states:

1. In this case, Defendant is charged with the June 28, 2008, homicide of Scott Pierce, under the following counts: murder, contrary to NMSA 1978, §30-2-1(A)(open count and first degree); conspiracy to commit murder (open count & first degree), contrary to NMSA 1978, §30-2-1(A)C; Aggravated Burglary (Deadly Weapon), contrary to NMSA 1978, §30-16-4(A); conspiracy to commit Aggravated Burglary (Deadly Weapon) contrary to NMSA 1978, §30-16-4C; False imprisonment, contrary to NMSA 1978, §30-4-3; Aggravated assault with a

deadly weapon, contrary to NMSA 1978, §30-3-2(A); Tampering with evidence, contrary to NMSA 1978, §30-22-5; Firearm/Destructive device by a felon, contrary to NMSA 1978, §30-7-16.

2. On December 20, 2007, two door to door salespersons for Integrity Program, LLC, Defendants Travis R. Rowley and Michael J. Lee were charged in the homicides of Tak and Pung Yi, CR 2007-5644 and CR 2007-5643 respectively.

3. On January 22, 2008, the City of Albuquerque filed in federal court, its complaint against Defendants Rowley and Lee, as well as the magazine company (Integrity Program/Sales, Prestige Sales, Magazine Fulfillment Services) for abatement of public nuisance, negligent hiring, retention, and supervision, equitable relief, and punitive damages (amended July 14, 2008).

4. Mayor Martin Chavez also sought a no knock city ordinance, which was recently rejected by the Albuquerque City Council on September 4, 2008. On information and belief, the ordinance was sought to bolster and support the pending federal lawsuit.

5. On or about August 6, 2008, State's Attorney, Linda Mott advised Undersigned Counsel that Defendant's DNA was discovered under the fingernails of another homicide victim, wherein two other persons were charged: Travis Rowley and Michael Lee.

6. On or about August 5, Detective Fox spoke with the Defendant without presence of counsel, and the Defendant indicated he would provide a statement, in exchange for ensuring that the death penalty was not pursued and Defendant's custody was transferred to another state.

7. On or about August 18, 2008, ADA Linda Mott contacted Undersigned Counsel and telephonically extended the following offer: Defendant was to provide a statement in exchange for a consolidated plea agreement, wherein he would admit to his involvement in the

Yi and Pierce cases and the death penalty would not be pursued and the Defendant's custody would be transferred to another jurisdiction.

8. Undersigned accepted the offer on behalf of her client and Ms. Mott arranged for the statement to be taken on August 19, 2008 in Judge Murdoch's courtroom.

9. On August 19, the Defendant was transported to Judge Murdoch's courtroom where he met with Detectives Michael Fox, Kevin Morant and Flores; however, Ms. Mott abruptly left and Detective Flores stated that Ms. Mott would not be in attendance, as she had to file an emergency motion with the Supreme Court. When Undersigned indicated that no statement would be provided, detectives responded that time was of the essence and they would honor the agreement as agents of the district attorney's office. Accordingly, the statements made in expectation of entry of a plea agreement and the prosecutor's assurance thereon, are governed by NMRE 1986, Rules 11-410, 11-5-304F and the caselaw in support of same.

10. On information and belief, Ms. Mott was directed by her superiors not to attend the meeting, but to encourage and facilitate its occurrence.

11. Prior to providing any statement, all parties signed a hand-written confidentiality agreement, wherein they agreed that the statement would not be shared with the media as the statement was in furtherance of plea negotiations and that all parties would keep all discussions in confidence. Those persons were Ron Brown, CO of MDC; Detective Michael Fox of APD; Detective Flores, APD; Detective Kevin Morant, APD; Larry Trujillo, law offices of Liane E. Kerr and the Undersigned Attorney, Liane E. Kerr.

12. The Defendant provided a statement, per the agreement of the parties, with the understanding that it was not admissible against him at trial, should the discussions break down. In spite of the representations extended by the District Attorney's Office that a consolidated plea

would be entered following Defendant's statement, no written paperwork was provided by the State.

13. On or about August 21, 2008, Defendant's counsel filed a motion to withdraw her representation, due to her belief that the prosecutor was "playing" her client; however, when Undersigned explained her concerns to her client, he asked that she remain in the case and suggested making an offer of proof, assisting law enforcement with additional information relative to unsolved cases in the metropolitan area. In fact, the Defendant did make such an offer, through his counsel—none of which was made on the record, but which have been confirmed by law enforcement and which will help them close cases and provide closure to families. Defendant extended himself further than requested by the prosecutor, in a good faith effort to sustain the plea arrangement.

14. When still no written plea agreement was forthcoming, Undersigned e-mailed Ms. Mott, who requested that the Defendant provide a second statement to clarify questions of her office. In spite of the fact that Defendant had already fulfilled his part of the bargain (and more), the Defendant provided a second statement on September 19, 2008.

15. On information and belief, Ms. Brandenburg told law enforcement what she wanted from Mr. Bloomfield by way of a statement and in response to officers' questions, with the understanding that if he gave the "expected" response, the plea agreement would be entered.

16. When the plea was still not scheduled and Undersigned sought a hearing date, Undersigned received a phone call from Ms. Mott, who advised that Ms. Kari Brandenburg, Mr. Todd Heisey and Mr. David Waymire were all present and on speaker phone. Undersigned personally spoke with Ms. Brandenburg, who specifically said, "Liane, I am not trying to burn your client. I have represented people like this before. All I want is a truthful statement about

what happened.” Ms. Brandenburg demanded the Defendant take a polygraph and Undersigned declined until a WRITTEN agreement and court setting was in place, given the fact that Ms. Brandenburg continued to change the terms of the original offer. Ms. Brandenburg then told Undersigned that regardless of his story, she wanted it taken under oath and that a plea setting would be had on Monday (Oct. 5) or Tuesday (Oct. 6) after she had spoken with the various victims’ families. Defendant now knows that Ms. Brandenburg spoke with those families on October 2, 2008.

17. Based on this representation, on October 2, 2008, while Ms. Brandenburg was meeting with the families, the parties met at the Police Station, where Mr. Waymire was in attendance and agreed on the record that the contents of the statement would not be disclosed per the prior agreement.

18. On information and belief, APD representatives will testify that Ms. Brandenburg had advised a deal had been struck and a plea would be entered on Monday, October 6, 2008.

19. Further, on information and belief, family members had already indicated they agreed with the resolution. The proposed resolution would not only provide closure for the families, but would save the State of New Mexico hundreds of thousands of dollars and would ensure that the Defendant was incarcerated for the balance of his life. If ADA David Waymire, understood otherwise, he could certainly have addressed that matter prior to or during the statement, but did not.

20. It is clear that the DA Kari Brandenburg pointedly lied to law enforcement and to counsel for the Defendant in order to entice additional information to assist her with prosecution of a high profile case.

21. Subsequently, the Albuquerque Journal reported some of the subject matter from

the confidential discussions. When confronted, representatives of the District Attorney's Office blamed Lisa Torraco, Ms. Brandenburg's opponent in the upcoming election. Ms. Torraco did not have access to the information provided to law enforcement due to the confidentiality agreement and it is believed the information was leaked to the media by Ms. Brandenburg and/or her representatives.

22. On October 6, 2008, Undersigned received the following email from prosecutor David Waymire:

Liane, I wanted to make sure you knew that at the last in-chambers, on the record hearing in Rowley/Lee's cases, Judge Reed Sheppard ordered that we disclose the three Bloomfield statements to Rowley and Lee's attorneys by October 17th. If you wish to try to intervene or challenge this ruling on behalf of your client, I would suggest you do so before October 17th. Thanks. David

When asked HOW that information was disclosed, Mr. Waymire responded that he disclosed it in violation of the agreement with Mr. Bloomfield. Because October 17 is the deadline presented by Judge Sheppard and because Ms. Brandenburg has a history of reneging on her agreements in this case and because she also has a pattern of sealing information which is damaging to her campaign, Defendant requests an emergency setting in this matter.

23. Undersigned Counsel immediately pointed out to Mr. Waymire that such disclosure was violative of the Rules of Professional Conduct, the Rules of Evidence and caselaw forbidding use of statements made in furtherance of plea negotiations; however, Mr. Waymire did not respond.

24. Additionally, on information and belief, Ron Brown, CO from the Metropolitan Detention Center, openly discussed with another CO what occurred in the jury room for that first statement. The Defendant was approached by another CO who told him that Brown was calling the Defendant a snitch. On information and belief, CO Brown is under investigation.

25. Further, Undersigned has learned the Defendant Rowley filed a federal suit against Ms. Brandenburg and law enforcement for their willful failure to provide information to him in the matter of Rowley v. City of Albuquerque, Martin Chavez and Kari Brandenburg, 1:08-cv-0080 MCA/LFG. Counsel for Mr. Rowley has maintained he is entitled to the statements and has indicated that he is aware of their contents due to disclosures by the District Attorney's Office.

26. Prosecutors are aware that Defendant has been diagnosed with COPD and Hepatitis C and his life expectancy is of short duration.

27. Defendant has been on probation for a crime he has always maintained he did not commit; that is the armed robbery of Edwin and Rupe Garcia. On Saturday, October 4, 2008, DA Brandenburg said, "There is some question whether he even committed the armed robbery. There are some things that have come up since." At no time have those things that have come up been shared with the Defendant.

28. Defendant will call the following witnesses in support of this motion: Detective Michael Fox, APD; Detective Flores, APD; Detective Kevin Morant, APD; Sgt. Arequette, APD; Sgt. Montano, APD; DA Kari Brandenburg; ADA David Waymire; ADA Todd Heisey; ADA Linda Mott and Lisa Torracco, in support of this motion.

ARGUMENT

DEFENDANT'S CASE SHOULD BE DISMISSED BASED ON PROSECUTORIAL MISCONDUCT AND THE DISTRICT ATTORNEY SHOULD BE SANCTIONED; OR ALTERNATIVELY, THE SECOND JUDICIAL DISTRICT ATTORNEY'S OFFICE SHOULD BE REMOVED FROM PROSECUTING THIS CASE AS THEIR ACTIONS HAVE RESULTED IN THE NEED FOR THEIR TESTIMONY AND AS SUCH, THEY ARE CONFLICTED FROM CONTINUED PROSECUTION OF MR. BLOOMFIELD.

G.The Statements Provided by Clifton Bloomfield were Provided in Furtherance of Plea Negotiations and are Barred from Disclosure by the Prosecution, yet some of the Contents were Leaked to the Media, in Violation of the Rules of Evidence and

Professionalism.

The three statements made by Clifton Bloomfield were made in furtherance of plea negotiations and are therefore subject to exclusion. *See* NMRE, Rules 11-410 & 5-304F. Rules 410 and 5-304F exclude statements made in connection with plea negotiations in any subsequent proceeding. At all times hereto, the statements were initiated by the prosecution and at all times, were made with the understanding that the Defendant would enter a plea of guilty in exchange for non-pursuit of the death penalty and transfer of his case to another jurisdiction. The Defendant relied upon the prosecution's representations to his detriment, as District Attorney Kari Brandenburg has not fulfilled promises she made. Rather, she has continued to change the parameters of the offer, seemingly in an attempt to obtain a statement which supports her interest in pending lawsuits. Regardless of the State's misconduct in plea negotiations, the Defendant's statements are inadmissible against Defendant Bloomfield and non-disclosable to other defendants. *See* NMRE, Rules 11-410 and 5-304F; State v. Anderson, 116 N.M. 599, 866 P.2d 327 (1993)(Statements made in furtherance of plea negotiations are inadmissible); State v. Setzer, 1997-NMSC-004 (State has no responsibility to provide statements of co-defendants where the statement is made for the purpose of possible plea negotiations).

In Anderson, *supra*, the defendant offered to confess to a New Mexico murder in exchange for a Texas detective dismissing burglary charges pending in Texas. Because the statement was offered by the defendant, as an offer to confess, the court held that the statement was not made in reliance on Rule 410, as a result of inducement by the state, nor during formal plea negotiations. That is contra to the case at hand, as the Defendant was induced to make statements in exchange for a global resolution and he reasonably expected that the State would abide by its offer following the first statement. Defendant did not "confess"; rather, a plea

agreement was the purpose of providing the statements.

To determine whether a defendant's statement is considered part of a plea negotiation, the court determines "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion," and, second, the court determines whether the accused's expectation that he was actually engaged in plea negotiations "was reasonable given the totality of the objective circumstances." United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir.1978) (en banc); United States v. Pantohan, 602 F.2d 855, 857 (9th Cir.1979). This case is governed by Robertson and Pantohan in that the Defendant reasonably relied upon representations and made statements in furtherance of those representations.

Relevant statements are made inadmissible by Rule 410 only when defendant has relied upon the rule or upon inducement by the state in breaking his silence. State v. Trujillo, 93 N.M.

724, 605 P.2d 232 (1980). In Anderson, the Court reasoned that in order to assure "fairness", when a suspect is induced by the state to engage in plea negotiations, as in formal plea negotiations with a state attorney (or an agent of the attorney), there will be an irrebuttable presumption that such person has relied on the rule in breaking his silence, and all statements made during the course of "making a deal" are inadmissible in future proceedings, whether the statements are offers to confess or offers to plead guilty, and regardless of whether the declarant has been formally charged with a crime.

Mr. Bloomfield broke his right to remain silent in providing statements to the State, with the understanding that the State would keep its part of the agreement. Accordingly, the statements made in expectation of entry of a plea agreement and the prosecutor's assurance thereon, are governed by Rule 11-410, 11-5-304F and the caselaw regarding same.

B. In Continuing to Entice the Defendant into Making Statements to his Detriment, the Prosecution, Specifically ADA Brandenburg, Placed Politics Above Justice, as Law Enforcement is Part of the Prosecution Team and Each is Bound by Representations and Actions of the Other; Accordingly, her Actions Resulted in Prosecutorial Misconduct.

District Attorney Kari Brandenburg has not only violated the Rules of Professional Conduct, *see* NMRA 1985, Rules 16-304, 16-306 and 16-804, she has engaged in prosecutorial misconduct. In encouraging the Defendant to provide a statement in exchange for a plea, but

then renegeing by demanding he provide a different statement, Ms. Brandenburg encouraged the Defendant to provide a false statement contrary to Rule 16-304 (A lawyer shall notcounsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law”). Given the nature of information provided to the media—including inconsistencies---it is certain that someone from the DA’s Office violated Rules 16-306 & 16-804(A lawyer shall not make any extrajudicial or out-of-forum statement in a criminal proceeding that may be tried to a jury that the lawyer knows or reasonably should know....creates a clear and present danger of prejudicing the proceeding). Finally, the special responsibilities of a prosecutor are violated if Ms. Brandenburg prosecuted the Defendant for an earlier charge she now believes he did not commit. *See* Rule 16-804.

It is professional misconduct per 16-804 for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation... or engage in conduct that is prejudicial to the administration of justice. The District Attorney’s Office extended an offer and regardless of whether they attended the meetings where the Defendant provided a statement, the statements were encouraged by the district attorney’s office and Defendant made them in expectation of entry of a plea agreement. DA Brandenburg has procrastinated in entering the agreement, presumably because of politics and not in contravention of same, contrary to her statements to the Journal that her actions are not due to politics. Brandenburg’s office clearly believes it is not obligated to any actions by law enforcement; however, New Mexico caselaw contravenes that position.

Ms. Brandenburg may attempt to claim that actions of law enforcement are not subject to the dictates of her office; however, “the ‘prosecution’ for Brady purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, *as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture.*” Smith v. New Mexico, 50 F.3d at 824 (citation and footnote omitted); State v. Wisniewski, 103 N.M. at 435, 708 P.2d at 1036; United States v. Perdomo, 929 F.2d 967, 978 (3rd Cir. 1991) (term "prosecution" includes all investigatory activities); United

States v. Safavian, 233 F.R.D. 12 (2005) (all agencies) *see also* ABA Standards for Criminal Justice, Discovery and Trial by Jury 11-2.1(a) (3d ed. 1995) (describing prosecutor's duty over evidence within possession or control of *any government agent* or police officer). In this case, it was the district attorney's office that extended the plea offer and upon which the defendant relied; it was the district attorney's office who has continued to change the terms of the agreement.

Notwithstanding that the State engaged in unfair dealings in enticing Mr. Bloomfield into making certain disclosures, the State committed prosecutorial misconduct through a combination of actions and failures to act, beginning with the State's failure to disclose its association with the City's lawsuit against the Magazine company, in violation of the Due Process Clause of the United States Constitution under the standard announced in Brady, 373 U.S. at 87, that requires the prosecution to disclose evidence that is material to the defense.

Our Supreme Court has held that prosecutorial misconduct amounts to fundamental error when it is "so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." State v. Allen, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 72. In this case, DA Brandenburg has blatantly misrepresented that a plea would be entered on Monday or Tuesday, October 6 or 7, *regardless of what he said in the third statement*. This enticement was gauged to encourage continued cooperation by Defendant with no movement by the prosecution. In State v. Romero, 94 N.M. 300, 609 P.2d 1256 (Ct. App. 1980), the court noted, "Our sense of these cases is that the remedy of automatic reversal regardless of objection is designed, in significant part, as a prophylactic measure to deter prosecutors from obtaining convictions by unfair tactics. *See also, e.g., State v. Wilson*, 109 N.M. 541, 787 P.2d 821 (1990); State v. Isiah, 109 N.M. 21, 781 P.2d 293 (1989); State v. Clark, 108 N.M. 288, 772 P.2d 322 (1989), *cert. denied*, 493 U.S. 923, 110 S. Ct. 291 (1989), *overruled on other grounds by State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990); State v. Taylor, 104 N.M. 88, 717 P.2d 64 (Ct. App. 1986); State v. Day, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978); State v. Vallejos,

86 N.M. 39, 519 P.2d 135 (Ct. App. 1974); State v. Diaz, 100 N.M. 210, 215, 668 P.2d 326, 331 (Ct. App. 1983) (*citing Vallejos* and noting similarity between concepts of "fair trial" and "fundamental error"). Most notably, in the context of prosecutorial misconduct, the concepts of substantial Justice and fair trial have become intertwined in that a finding of fundamental error arising from prosecutorial misconduct inevitably leads to reversal, based on recognition of the fact that the right to a fair trial has been compromised. *See, e.g., State v. Ramirez; State v. Diaz.* If the district attorney engages in misrepresentations, she is no better than the people she prosecutes.

The courts have held that “[W]hen prosecutorial misconduct is so blatant and prejudicial as to compromise the fair administration of Justice, the concepts of fair trial and substantial Justice are identical.” *See State v. Armijo*, 118 N.M. 802, 811, 887 P.2d 1269, 1278 (Ct. App. 1994) (deferring to the district court's factfinding in alleged prosecutorial misconduct case and then treating as a matter of law, reviewed de novo on appeal, the issue of whether the record supports a finding of conduct by the prosecution that so violated required legal norms as to justify sanctions). A court can dismiss criminal charges based on severe prosecutorial misconduct. *See generally State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792(adopted a standard of willful disregard for determining when retrial is barred because of prosecutorial misconduct, which in Breit was described as "pervasive, incessant, and outrageous"). The dismissal of criminal charges for prosecutorial misconduct is an extreme sanction that should be reserved for the most severe prosecutorial transgressions. *See Mathis v. State*, 112 N.M. 744, 747, 819 P.2d 1302, 1305 (1991); Bartlett, 109 N.M. at 680, 789 P.2d at 628. The fact that DA Brandenburg extended a plea offer to Defendant Bloomfield as an enticement for information, but then changed the terms for additional statements and information constitutes such pervasive, incessant and outrageous behavior.

C. The District Attorney’s Office Will be Called as Witnesses in this Case and are Therefore, Conflicted from Further Prosecuting this Case.

Prosecutors Waymire, Mott, Brandenburg, and Heisey, as well as Law Enforcement Fox,

Flores, Morant, Chavez and Aregette will be witnesses in the motion hearing and are witnesses as to events and are therefore, precluded from prosecuting this case. Therefore, the district attorney's office is disqualified from continuing prosecution of this case. Although the Rules of Professional Conduct do not provide the sole grounds for disqualification of counsel, *see United Nuclear*, 96 N.M. at 244, 629 P.2d at 320; *Sanders*, 1997-NMSC-002, ¶ 10, they do provide relevant examples of circumstances which may give rise to the need for disqualification. *State v. Barnett*, 965 P.2d 323 (Ct. App. 1998).

It is a conflict of interest for the district attorney to be called as a witness in a case he is also prosecuting. Is reversible error for a district attorney to be both witness and prosecutor. *State v. McCuiston*, 88 N.M. 94, 537 P.2d 702 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975).

This rule is intended to prevent the prosecutor from adding to the weight or credibility of the evidence by acting as both a witness and an officer of the court. *See United States v. Johnston*, 690 F.2d 638 (7th Cir.1982); *see also State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977)(A prosecutor who testifies for the state must withdraw from the case).

Even if the Second Judicial District Attorney's Office withdraws, this case must be dismissed and reindicted *See e.g. State v. Pennington*, 115 N.M. 372, 851 P.2d 494 (Ct. App. 1993) (the appointment of a special prosecutor cannot fully allay a concern of conflict of interest, since unless the special prosecutor begins the investigation from scratch, even a special prosecutor of absolute integrity cannot avoid the possibility that material supplied by the district attorney's office or police agencies has been contaminated by disclosures from the disqualified employee).

WHEREFOR for the foregoing reasons, the Defendant respectfully requests this Court dismiss his charges for prosecutorial misconduct, to consider issuing sanctions against the District Attorney Kari Brandenburg and/or alternatively to disqualify the Second Judicial District Attorney's Office from Prosecuting this Case Due to Conflict of Interests created by them.

Respectfully submitted,

Defendant

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I hereby certify that a copy of the foregoing was mailed
to opposing counsel this ____ day of October, 2008.

LIANE E. KERR