

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

STATE OF NEW MEXICO,

Plaintiff,

v.

No. D-101-CR-202300040

HANNAH GUTIERREZ-REED,

Defendant.

BRIEF IN SUPPORT OF THE APPOINTMENT OF A SPECIAL PROSECUTOR

District Attorney Mary Carmack-Altwies, on behalf of the State of New Mexico, respectfully submits the following Brief In Support of the Appointment of a Special Prosecutor which addresses the issues raised by the Court in its March 20, 2023, correspondence to the parties to this action.

INTRODUCTION

This Brief is provided to the Court in response to its March 20, 2023, correspondence requesting the parties to address the issues of whether the District Attorney has “good cause” to appoint a special prosecutor in the above-referenced cases, and if so, whether the District Attorney may maintain an active role in the prosecution of the case and work as co-counsel with the special prosecutor. Because these cases do not involve a situation in which the District Attorney appoints a special prosecutor due to a conflict or for other ethical reasons, and instead is appointing a special prosecutor for “other good cause,” there is no basis to prohibit the District Attorney from working as co-counsel with the special counsel. More specifically, the New

Mexico Supreme Court has held that courts must avoid wading into discretionary prosecutorial decisions and may not place limits on the decision-making authority of the prosecuting office. A ruling prohibiting the special prosecutor from assisting the district attorney as co-counsel would not only run afoul of this holding, it would also greatly prejudice the State's ability to prosecute this case given the enormous work already performed by the District Attorney's staff which would be rendered unusable. With only five weeks until the preliminary hearing and given the scope of this case, there would be insufficient time for the special prosecutor to duplicate all of the work done by the District Attorney's office and be sufficiently up to speed to properly represent the State.

ARGUMENT

I. Good Cause Exists to Appoint a Special Prosecutor

The appointment of a special prosecutor in a New Mexico criminal case is not novel. The practice happens with sufficient frequency that the New Mexico Legislature enacted statutory language governing such appointments at NMSA 1978, § 36-1-23.1, which provides:

Each district attorney may, when he cannot prosecute a case for ethical reasons or other good cause, appoint a practicing member of the bar of this state to act as special assistant district attorney. Any person so appointed shall have authority to act only in the specific case or matter for which the appointment was made. An appointment and oath shall be required of special assistant district attorneys in substantially the same form as that required for assistant district attorneys in Section 36-1-2 NMSA 1978.

In many instances, a special prosecutor is appointed because the District Attorney has an actual or apparent conflict that would make her involvement in the case improper. Such a conflict would trigger the first provision of the statute, which allows a special prosecutor where required for ethical reasons. Such a conflict does not exist here, nor has any defendant raised an

allegation of any such conflict¹. Neither the District Attorney nor any member of her staff is conflicted with regard to any of the three Rust shooting defendants, including Defendant Hannah Gutierrez-Reed. Consequently, the “ethical reasons” provision does not apply, and there is no reason under § 36-1-23.1 or the New Mexico Rules of Professional Conduct that prohibit the District Attorney’s joint involvement in the case together with the special prosecutor.

The legislature provided a second, much broader provision in § 36-1-23.1 that permits the appointment of a special prosecutor when the District Attorney has “other good cause.” Although the legislature did not define “good cause” and New Mexico courts have had limited opportunity to examine its meaning, the inclusion of the ability for the District Attorney to appoint a special prosecutor for other than ethical reasons shows the legislature anticipated additional circumstances where a special prosecutor appointment is warranted. The New Mexico Supreme Court affirmed that “budget constraints may provide good cause for the appointment of special prosecutors.” State v. Hollenbeck, 1991-NMCA-060, ¶ 14, 112 N.M. 275, 278, 814 P.2d 143, 146. Just as in Hollenbeck, the District Attorney here has been clear in her requests for funding that the basis for appointing a special prosecutor is because the office lacks sufficient staffing to prosecute the Rust cases without jeopardizing any of the other equally important pending criminal cases. In support of the funding requests, the District Attorney provided the following data (updated to reflect the most recent available information):

A. Workload:

A breakdown of the District Attorney’s workload for the past twenty (20) months (July 1, 2021 through March 21, 2023), demonstrates the following:

¹ Defendant Baldwin has agreed to the appointment of a special prosecutor and does not object to the District Attorney serving as co-counsel to the special prosecutor.

- Cases referred for prosecution: 7,397²
- Homicide/Complex Crime Litigation (cases resolved since July 1, 2021): 30

B. Projected staffing:

Including the District Attorney, the Santa Fe Office of the First Judicial District Attorney (“FJDA”) has a total of 25 attorney positions. Of those 25, there are five (5) current vacancies and an additional three (3) attorneys leaving the FJDA in the next month, leaving the Santa Fe office with 17/25 attorneys (8 vacancies), or a 32% vacancy rate. Additionally, one (1) attorney position from the Espanola office which had been temporarily relocated to Santa Fe will also become vacant, for a total of nine (9) attorney vacancies.

The intake team consists of four (4) attorneys who handle preliminary hearing dockets in Magistrate Court, and pretrial detention and 10-day preliminary hearings in District Court. The most complex and serious cases are on the strictest deadlines. The intake attorneys have hundreds of felony cases in the queue at any given time. The trial team (district wide) consists of 12 ADAs carrying full felony caseloads. Two of these attorneys are leaving their positions in April 2023. Caseloads will be at an average of close to 90 by the end of April.

In terms of recruitment of new attorneys, the statewide interest in prosecution has declined considerably in recent years. Within the past six months, the FJDA receives about 1-3 attorney resumes in a month. Many of the resumes the FJDA receives are for 3rd year law students who plan to take the summer 2023 bar exam. The statewide demand for prosecutors is at an all-time high, as reflected in the March 8, 2023, Bar Bulletin³: Eight of the 14 District Attorney offices are hiring, with the Second Judicial District recruiting for forty (40) prosecutors.

² Current caseload as reflected in the FJDA Case Management System.

³See pp. 28-32: https://www.sbnm.org/Portals/NMBAR/PubRes/BB/2023/BB_2023-03-08_1.pdf?ver=1z2086XO0QuvCUHKmZMTtw%3d%3d

C. The FJDA's Justification for Funding, Accepted by Both the Board of Finance and NM Legislature is to Supplement, Not Replace FJDA Efforts.

The FJDA was clear and candid about the need for a special prosecutor as a supplement/supportive function to the existing District Attorney's efforts and demands. This was clear in the FJDA emergency request to the Board of Finance, and in the FJDA special appropriation in House Bill 2. There is built-in integrity in both the Board of Finance and appropriation process. The integrity of these processes guard against requests that are made contrary to law and ensure a justification is based on, at a minimum, "good cause."

"Budget constraints may provide good cause for the appointment of special prosecutors." State v. Hollenbeck, 1991-NMCA-060, ¶ 14, 112 N.M. 275, 278, 814 P.2d 143, 146.

As set forth in greater detail in "Exhibit A" to this brief, the FJDA provided the following justification for additional funding for the prosecution of this and related cases:

- The FJDA requested emergency funding from the Board of Finance in the amount of \$635,500
- FJDA justification satisfied statutory "emergency" standard of Board of Finance and scrutiny through the Legislative process.
- In September 2022, the New Mexico Board of Finance found sufficient cause to grant "emergency grant funding" funding to the FJDA in the amount of one-half of its request for \$317,750.
- Emergency Fund Pursuant to NMSA 1978, § 6-1-2 and Emergency Funding Policy 11-03
- Emergency is defined as "an unforeseen occurrence or circumstance severely affecting the quality of government services and requiring the immediate expenditure of money..." § 6-1-2.

- FJDA justification in “Attachment 1: “RUST” Emergency Grant Funding Request
- The FJDA justification satisfied the high standard of an emergency pursuant to NMSA 1978 § 6-1-2. Accordingly, the same justification satisfies the less stringent standard of good cause in §36-1-23.1.

After the Board of Finance approved a grant in the amount of one-half of the FJDA request, the FJDA requested the remaining special prosecution budget through a special appropriation during the 2023 Legislative Session. The amount was initially funded through the Governor’s Executive Recommendation, and through the standard legislative process, the special appropriation of a total of \$360,000 cleared both legislative chambers and is awaiting the approval of the Governor in House Bill 2.

Given the workload associated of prosecuting cases of this magnitude, taken together with the severe staffing shortage that exists at the FJDA, “good cause” for appointing a special prosecutor exists without question.

II. THE DISTRICT ATTORNEY MAY CO-COUNSEL WITH THE SPECIAL PROSECUTOR

Having established “good cause” for appointing a special prosecutor, the next issue is whether the District Attorney may co-counsel with the special prosecutor. Although this question has not been directly addressed by New Mexico courts, there is nothing in the law that prevents the District Attorney from co-counseling with the special prosecutor, when the special prosecutor retains the “full duty, authority, and discretion to make decisions concerning Defendant's case.” State v. Surratt, 2016-NMSC-004, ¶ 29; 363 P.3d 1204, 1212.

The New Mexico Supreme Court further explained that the District Attorney and special prosecutor retain broad authority to conduct the case as they see fit. “[C]ourts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys, and the courts will

require clear evidence of an intent by the legislature to limit prosecutorial discretion.” Surratt ¶ 14, 1208. “[New Mexico] is unique in that the legislature granted the district attorney who perceives a conflict the authority and discretion to appoint a special prosecutor without seeking leave of the court or permission from the attorney general prior to making the appointment. See NMSA § 36-1-23.1. This is consistent with the high value New Mexico places on public confidence in the integrity of the office of the district attorney, Gonzales, 2005-NMSC-025, ¶¶ 37, 51, 138 N.M. 271, 119 P.3d 151, and with the desire to maintain a prosecutor's distinctive role of disinterested and impartial public advocate State v. Robinson, 2008-NMCA-036, ¶¶ 16-17, 143 N.M. 646, 179 P.3d 1254.” Surratt, ¶ 21; 1209-1210.

“In construing statutory sources of authority, we are careful to avoid restricting a district attorney's prosecutorial discretion. See Santillanes, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456 (discussing flexible application of a rule of construction so as not to "infringe unnecessarily on the broad charging authority of district attorneys"). This has been true in our limited construction of Section 36-1-23.1. For example, in State v. Cherryhomes this Court looked at the statutory language and, **in the absence of an implicit or explicit Legislative restriction, determined that the Legislature did not intend the appointment to be personal to the appointee but rather allowed a special prosecutor to delegate responsibilities associated with the appointment.** See 1996- ¶ 11, 122 N.M. 687, 930 P.2d 1139. In fact, we noted in Cherryhomes that **the language of 36-1-23.1 only places restrictions on a special prosecutor's scope of authority to act in "the specific case or matter for which the appointment was made."** Id. ¶ 8 (quoting Section 36-1-23.1). The statute places no other constraints on a special prosecutor's authority to act in a given case provided an appointment is made and an oath taken. See § ; see also , ¶ 6 (“[T]he rationale for requiring authorization for prosecution is to avoid prosecution by persons who are not held accountable or subject to the oath of office.” (internal quotation marks and citation omitted)).

Surratt, ¶ 22; 1210. (emphasis added.)

In Surratt, the court made clear that the absent a clear legislative restriction, special prosecutors retain full prosecutorial authority over a case, including the delegation of responsibilities. Indeed, the only limitation the New Mexico Supreme Court has recognized with regard to a special prosecutor's authority is that it is limited in scope to the specific case(s) for

which the appointment was made. There is nothing in any of the decisions that would permit a court to disallow the special prosecutor from co-counseling with the District Attorney and her staff.

Both the enabling statute and the New Mexico Supreme Court's interpretive guidance make clear the District Attorney and special prosecutor have wide latitude to prosecute the case in the manner they deem necessary and that courts should refrain from interfering with the prosecutorial process. Here, the decision was made to name a special prosecutor not because of an ethical conflict, but because of the lack of staff and overwhelming caseload at the District Attorney's office. It is inappropriate to pull resources from other cases to deal with one, high-profile case in which a great deal of litigation is expected. Consequently, it is imminently reasonable to bring on additional resources in the form of a special prosecutor. It is also reasonable for the District Attorney to continue working on the case because no ethical reason exists which would prohibit her from doing so and because removal from the case would greatly prejudice the state.

III. PROHIBITING THE DISTRICT ATTORNEY FROM CO-COUNSELING WITH THE SPECIAL PROSECUTOR WOULD IMPROPERLY PREJUDICE THE STATE

The three "Rust" set shooting cases have been active for nearly 18 months. During that time, the District Attorney and her staff have performed an enormous amount of work including hiring experts, obtaining witness statements, conducting investigations, and many other prosecution-related activities. Were the court to prohibit the District Attorney, and by extension her staff, from participating in the case, all of the groundwork done would either have to be redone by the special prosecutor or at best would have to be studied from the ground up. This would greatly increase the workload of the special prosecutor, who is already facing immense pressure to prepare for a two-week preliminary hearing a short five weeks away. Disallowing the

District Attorney, her staff, and their work product accomplished to date would not only amount to an extreme waste of taxpayer resources and duplicative effort, but would also greatly prejudice the prosecution.

CONCLUSION

The legislative intent and caselaw is clear: the District Attorney is permitted to appoint a special prosecutor for “other good cause,” including when budgetary factors and caseloads justify doing so, as has been demonstrated here. Moreover, the special prosecutor enjoys wide latitude to make the prosecutorial decisions he or she deems necessary, including to co-counsel with the District Attorney. Entry of an order denying the special prosecutor the ability to co-counsel with the District Attorney would impermissibly infringe on the special prosecutor’s prosecutorial authority and would unduly prejudice the State’s prosecution of these crimes. Consequently, the State respectfully requests the Court find good cause for appointing a special prosecutor and affirm the special prosecutor’s authority to co-counsel with the District Attorney, should the special prosecutor determine such an arrangement is in the best interest of the State.

Respectfully submitted,

/s/ Mary Carmack-Altwies
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March 2023, I served the forgoing pleading to all parties or counsel of record:

/s/ Mary Carmack-Altwies
Mary Carmack-Altwies

