

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

**STATE OF NEW MEXICO,  
Plaintiff,**

**vs.**

**No. D-101-CR-202400013  
The Honorable Mary Marlowe Sommer**

**ALEXANDER RAE BALDWIN,  
Defendant.**

**STATE'S MOTION FOR CLARIFICATION OF COURT'S ORDER AMENDING  
APRIL 21, 2023 ORDER ON DEFENDANT'S BRIEF ADDRESSING DISTRICT  
ATTORNEY'S POWER TO CONTINUE AS CO-PROSECUTOR AFTER  
APPOINTMENT OF SPECIAL PROSECUTOR IN STATE V. GUTIERREZ  
D-101-CR-2023-00040**

COMES NOW, the State of New Mexico, by and through Special Prosecutors, Kari T. Morrissey and Erlinda O. Johnson, who hereby request this Court clarify its Order Amending April 21, 203 Order on Defendant's Brief Addressing District Attorney's Power to Continue as Co-Prosecutor After Appointment of Special Prosecutor filed on August 7, 2023, in D-101-CR-00040 and as grounds state as follows:

1. On August 7, 2023, the Court filed the above-described order. The Court found that the plain meaning of NMSA 1978 § 36-1-23.1 prevented the elected District Attorney from serving as co-counsel along with an appointed special prosecutor. The Court instructed the elected District Attorney to choose between prosecuting the case against Hannah Gutierrez and appointing a special prosecutor. In response, the District Attorney, Mary Carmack-Altwies, withdrew from her representation of the State in the case and appointed a special prosecutor.
2. Undersigned counsel respects and agrees with the Court's ruling that the plain language

of the statute seems to bar the elected District Attorney from acting as co-counsel along with the special prosecutor.

3. In the instant motion the appointed special prosecutors are asking for clarification with regard to the Court's ruling in State v. Gutierrez. The special prosecutors intend to seek the appointment of an assistant special prosecutor who is an attorney who will be on extended unpaid leave from the First Judicial District Attorney's Office and engaging in no work for the District Attorney's Office.
4. The New Mexico Supreme Court in State v. Cherryhomes found that an Assistant District Attorney, working for an elected District Attorney who was appointed special prosecutor on a case in a neighboring district, could act at on behalf of the special prosecutor, even though the Assistant District Attorney had not been appointed special prosecutor. The Court stated "Section 36-1-23.1 requires only that the appointment and oath of a special prosecutor be in "substantially the same form" as the appointment and oath of an assistant district attorney. *We do not believe that Section 36-1-23.1 requires strict compliance to further the goal of the legislature.*" (emphasis added) 122 N.M. 687, 689, 1996-NMSC-072, 7, 930 P.2d 1139, 1141, 1996 N.M. LEXIS 461, 36.
5. The Court found that "Section 36-1-23.1 does not expressly preclude a special prosecutor from delegating responsibilities associated with his or her appointment. If the legislature had intended to preclude a district attorney appointed as a special prosecutor from delegating duties of that office to an assistant district attorney acting under his or her supervision, it could easily have done so. Because the legislature neither implicitly nor explicitly placed this restriction on district attorneys appointed as special prosecutors, the general principles of agency law permit such delegation of authority. *See New Mexico*

*Dep't of Health and Soc. Servs. v. Secretary of Agric.*, 376 F. Supp. 953 (D.N.M. 1973) (holding agent-principal relation exists between state food stamp agency and United States Department of Agriculture); *State v. Jaramillo*, 113 Idaho 862, 749 P.2d 1, 2 (Idaho Ct. App. 1987) (holding that prosecuting attorney's powers are conferred on deputy prosecuting attorney because their relation is that of principal and agent). Cherryhomes, at 690, 14, 1142, 1996 N.M. LEXIS 461, 9-10.

6. More recently, the New Mexico Supreme Court provided further interpretation of NMSA 1978 § 36-1-23.1 when deciding State v. Surratt, 2016-NMSC-004; 363 P.3d 1204; 2015 N.M. LEXIS 375. In Surratt, the Court found that “[t]he primary goal in construing a statute is to “ascertain and give effect to the intent of the Legislature.” *State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (internal quotation marks and citation omitted). The Court begins by “examin[ing] the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish.” *Nick R.*, 2009-NMSC-050, ¶ 11 (internal quotation marks and citation omitted). “This Court has rejected a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute.” *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.” Surratt at 12, 1207, 8.

7. The Court went on to opine “[A]n ordinary reading of the statute's plain language suggests the Legislature intended the statute to apply to the appointment of both private counsel and other public prosecutors. While the terms “special prosecutor” and “special assistant district attorney” are not specifically defined within the statute, its text is inclusive of both private counsel and other public prosecutors in its generic reference to

"a practicing member of the [New Mexico] bar." This plain-language reading is consistent with the definition of special prosecutor adopted by the National District Attorney's Association as "any person who performs the prosecution function in a jurisdiction who is not the chief prosecutor elected or appointed in the jurisdiction, or an assistant or deputy prosecutor in the jurisdiction." National District Attorney's Association, *National Prosecution Standards 2* (3d ed. 2009), available at [http://www.ndaa.org/pdf/NDAA NPS 3rd Ed. w Revised Commentary.pdf](http://www.ndaa.org/pdf/NDAA_NPS_3rd_Ed_w_Revised_Commentary.pdf) (last visited Dec. 7, 2015). Surratt, at 16, 1208-1209, 12-13.

8. The undersigned special prosecutors, with the Court's approval, intend to seek the appointment of an assistant special prosecutor who will be on extended unpaid leave from the First Judicial District Attorney's Office and performing no work for the First Judicial District Attorney's Office in any capacity.

WHEREFORE, for the above-stated reasons the State requests the Court clarify the above-described order filed in D-101-CR-2023-40 on August 7, 2023.

Dated: May 6, 2024

/s/ Kari T. Morrissey  
Kari T. Morrissey, Special Prosecutor  
1303 Rio Grande Blvd., Suite 5  
Albuquerque, New Mexico 87104-  
2698 505-361-2138  
[ktm@morrisseylewis.com](mailto:ktm@morrisseylewis.com)

#### **CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered via E-File and Serve a true and correct copy of the foregoing pleading to defense counsel, Luke Nikas, Alex Spiro, and Heather LeBlanc, on this 6<sup>th</sup> day of May, 2024.

/s/ Kari T. Morrissey  
Kari T. Morrissey