

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

STATE OF NEW MEXICO,

Plaintiff,

vs.

ALEXANDER RAE BALDWIN III
HANNAH GUTIERREZ-REED

No. D-101-CR-202300039
D-101-CR-202300040
Judge Mary Marlowe Sommer

Defendant(s)

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISQUALIFY THE SPECIAL PROSECUTOR

District Attorney Mary Carmack-Altwies, on behalf of the State of New Mexico, files this Response to the Motion to Disqualify the Special Prosecutor filed by Defendant Alexander Rae Baldwin III¹ and to Defendant Hannah Gutierrez-Reed's Notice of Joinder² in Defendant's Motion to Disqualify the Special Prosecutor Under Article III of the New Mexico Constitution, in which the Defendant(s) {collectively, in this Response, referred to as the "Defendant" herein}ask this Court to disqualify the special prosecutor based on a novel theory that has no support in New Mexico statutes or case law. Accepting Defendant's theory would require the Court to create new

¹ Defendant violated N.M.R. Crim. P. Dist. Ct. 5-120(D) by failing to confer with counsel for the State before filing his Motion and, therefore, the Motion is technically not properly before the Court. But the State is, in fact, opposed to the relief requested.

² Notice of Joinder filed February 20, 2023 with this Court

law, which would have state-wide implications, based on nothing more than creative, legally unsupported argument.

Defendant concedes that district attorneys—and by extension special prosecutors—do not fit squarely within either the executive or judicial departments of government. Rather than reach the logical conclusion that, therefore, the special prosecutor does not exercise the powers of either department, Defendant argues the opposite—that the special prosecutor must be exercising either executive power or judicial power (though Defendant doesn't know which) and that, therefore, Andrea Reeb's continued service as a special prosecutor is unconstitutional. This leap of logic is unfounded and, as admitted by Defendant, without any precedent in New Mexico law. Defendant's Motion should be denied.

ARGUMENT

A. The District Attorney/Special Prosecutor Does Not Exercise Powers Properly Belonging to Either the Executive or Judicial Department.

Defendant's Motion is based on Article III, Section 1 of the New Mexico Constitution, which provides in relevant part:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others

...

Although Ms. Reeb's service as a member of the New Mexico House of Representatives falls within the legislative department of the government, her role as special prosecutor in this case is not constitutionally prohibited because neither the district attorney, nor by extension the special prosecutor, are "charged with the exercise of powers properly belonging to" either the executive or judicial departments. Defendant concedes that "[n]either the New Mexico Constitution nor

caselaw is clear whether a district attorney exercises the power of the executive department or the judicial department.” (Motion, p. 5). But Defendant then simply concludes that it must be one or the other. The more logical conclusion, and the one supported by the text of the Constitution and case law, is that it is neither.

Defendant’s argument seems to stem from the misconception that all government employees must be members of one of the three “branches” of government. But that is not the state government structure set out in our Constitution. Instead, the Constitution sets up “three distinct departments,” and it then delineates the members of each of those departments. First, the legislative power “shall be vested in a senate and house of representatives.” (Art. IV, § 1). As discussed above, Ms. Reeb is certainly charged with exercising legislative power in her role as a legislator.

Second, Article V, § 1 provides that the “executive department *shall consist of* a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands” (Emphasis added). Local district attorneys are not included as part of the state’s “executive department,” and they do not exercise the powers assigned to any member of the state’s “executive department.” Had the framers wanted to include district attorneys in the executive department or to indicate that the list of executive department members was not exclusive, they could have easily done so. The statutory construction maxim “expression unius est exclusion alterius” teaches that the express listing of one or more things excludes all others.

Defendant claims that “New Mexico precedent suggests that ‘prosecution’ is a principal function of the ‘executive branch.’” (Motion, p. 5). But Defendant’s cited case suggests no such thing. Instead, the case discusses the role of the *attorney general*, who is specifically listed as a member of the executive department in Article V. *State v. Armijo*, 1994-NMCA-136, ¶ 48, 118 N.M. 802, 816, 887 P.2d 1269, 1283 (“For a court to forbid the attorney general from engaging in

a prosecution within the jurisdiction of the office is a serious encroachment on the executive branch.”). There is no New Mexico authority to suggest that district attorneys or special prosecutors “exercise the power of the executive department” in connection with local criminal prosecutions.

Third, Article VI, § 1 provides that the “judicial power of the state shall be vested in” the senate, when sitting as a court of impeachment, and in the numerous specifically identified courts. The power of the “judicial department” then, is essentially exercised by the judiciary. “The essence of judicial power is the final authority to render and enforce a judgment.” *Otero v. Zouhar*, 1984-NMCA-054, ¶ 33, 102 N.M. 493, 502, 697 P.2d 493, 502, aff’d in part, rev’d in part, 102 N.M. 482, 697 P.2d 482 (1985). Although district attorneys and public defenders are established under Article VI as part of the judicial system (§§ 24, 39), there is no argument that local prosecutors or public defenders are exercising the “judicial power of the state,” because they have no ability to “render and enforce a judgment.”

For that reason, the New Mexico Supreme Court has long recognized that, even though district attorneys are part of the judicial system, the office of district attorney is a *quasi-judicial office*, not a judicial office. *Matter of Amended Canon 7 of Code of Jud. Conduct: Lyons*, 1984-NMSC-053, ¶ 5, 101 N.M. 220, 221, 680 P.2d 601, 602; *State v. Chambers*, 1974-NMCA-058, ¶ 27, 86 N.M. 383, 386, 524 P.2d 999, 1002; *State ex rel. Ward v. Romero*, 1912-NMSC-011, ¶ 22, 17 N.M. 88, 125 P. 617, 620.

Defendant cites no authority, and the State is not familiar with any, for the proposition that “quasi-judicial officers,” such as district attorneys and special prosecutors, exercise the power of the judicial department.

Indeed, the primary “authority” relied on by Defendant is a two-person dissent from an unpublished case out of Nevada. *Caruso v. Eighth Judicial District Court in and for County of Clark*, 2022 WL 1584695 (Nev. May 18, 2022). The majority in that case explicitly “express[ed] no opinion on the merits of the separation-of-powers issue.” *Id.* at *1. Even if the Nevada dissent had any precedential authority in New Mexico (which it doesn’t), it relies on constitutional language that is different from New Mexico’s. First, under Nevada’s separation of powers provision, no member of one department shall exercise any functions “appertaining to”—i.e. concerning—either of the others. (Nev. Const. Art. III, § 1). In contrast, the New Mexico Constitution provides that no person charged with the exercise of powers properly belonging to one of the three departments shall exercise any powers “properly belonging to” either of the other departments. (NM Const. Art. III, § 1). The phrase “appertaining to” allows for a much looser connection than the phrase “properly belonging to” chosen by the New Mexico framers. In addition, the Nevada dissent apparently found that it was “clear” in Nevada that “prosecuting a crime—even at the local level—is an executive function.” *Caruso*, 2022 WL 1584695, at *3. As Defendant admits, that is not at all “clear” under the New Mexico Constitution.

Because Defendant has no authority to support Defendant’s theory, Defendant ultimately argues that “whether a District Attorney exercises the powers of the judicial department or the executive department is immaterial here.” (Motion, p. 6). But, to the contrary, whether a district attorney exercises such powers is the fundamental basis for Defendant’s entire Motion. The Court cannot simply assume or infer that the special prosecutor is constitutionally disqualified given the lack of authority on this issue.

B. The Constitutional Separation of Powers Is Not Absolute, and Ms. Reeb’s Service as Special Prosecutor Does Not “Unduly Encroach or Interfere” With the Authority of Any Government Department.

In addition or in the alternative, even if the Court were convinced that Ms. Reeb, acting as the special prosecutor, is exercising the powers of either the executive or judicial departments, that does not necessarily require her disqualification as Defendant argues. As discussed above, there is no authority on this precise issue. But the New Mexico Supreme Court has long recognized in other contexts that, although the language of Article III, Section 1 suggests an absolute separation of the three branches, “absolute separation of powers is ‘neither desirable nor realistic,’ and that the constitutional doctrine of separation of powers permits some overlap of governmental functions.” *N.M. Petroleum Marketers Assn. v. N.M. Env’t Impr. Bd.*, 2007-NMCA-060, ¶ 12, 141 N.M. 678, 682–83, 160 P.3d 587, 591–92; *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23, 125 N.M. 343, 350, 961 P.2d 768, 775 (quoting *State ex rel. Clark*, 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22 and *Mowrer v. Rusk*, 95 N.M. 48, 53, 618 P.2d 886, 891 (1980)); *State ex rel. Sandel v. New Mexico Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 12, 127 N.M. 272, 277, 980 P.2d 55, 60.

The Court need only intervene where “one branch of government *unduly encroaches or interferes* with the authority of another branch.” *Id.* (emphasis added) (citing *State ex rel. Clark*, 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22; *Rusk*, 95 N.M. at 54, 618 P.2d at 892). “Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions.” *Id.* (citing *State ex rel. Clark*, 1995–NMSC–051, 120 N.M. at 574, 904 P.2d at 23).

There is no actual or threatened encroachment here. Defendant does not allege that, as a legislator, Ms. Reeb will unduly encroach or interfere with the Defendant’s prosecution, or vice versa. To the contrary, Defendant’s argument seems to be that, because Ms. Reeb is acting as the special prosecutor, she might *thwart* a hypothetical attempt by the Legislature to encroach or

interfere with that prosecution. (Motion, p. 9) (arguing that Ms. Reeb’s “potential influence on her colleagues in the Legislature could thwart any efforts to legislatively foreclose” Defendant’s prosecution). Defendant does not explain how the Legislature could “legislatively foreclose” Defendant’s prosecution or how such an effort would not itself violate the separation of powers under his theory that prosecutorial discretion is an executive function.

In fact, any attempt by Ms. Reeb as a legislator to influence the outcome of this trial would be completely ineffective. The Constitution already provides protections against legislators affecting the outcome of pending cases. For example, no act of the Legislature can affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case. (NM Const., Art. IV, § 34). The intent of this constitutional provision “is to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state[.]” *State ex rel. Egolf v. New Mexico Pub. Regul. Comm’n*, 2020-NMSC-018, ¶ 20, 476 P.3d 896, 901–02 (quoting *Stockard v. Hamilton*, 1919-NMSC-018, ¶ 9, 25 N.M. 240, 180 P. 294)). Likewise, Defendant would not be exempt from prosecution and punishment for any crime or offense even if the applicable law were repealed by the Legislature. (Art. IV, § 33). In other words, Ms. Reeb will have no role in enacting any laws that could be enforced against Defendant in this case.

Defendant also points out that, under New Mexico Statute 8-5-2(B), the attorney general has the power to prosecute a case “when, in his judgment, the interest of the state requires such action or when requested to do so by the governor.” (Motion, p. 10). There is no argument that the attorney general or governor have any involvement in the prosecutions of this case. But Defendant argues that the attorney general might fail to properly exercise his power to intervene for fear of reprisal from a prosecutor who also serves in the Legislature. (*Id.*). This purported fear that the

attorney general will be too timid to properly exercise his statutory duties does not demonstrate any encroachment or interference with those duties by Ms. Reeb. Moreover, if the Court were to accept Defendant's theory that the district attorney is exercising powers of the judicial department when pursuing local prosecutions, then the attorney general's ability (as a member of the executive department) to take over such prosecutions would be unconstitutional. The Court cannot lightly adopt such a construction because this Court must begin with "a strong presumption" that statutes do not violate the Constitution. *Siebert v. Okun*, 2021-NMSC-016, ¶ 12, 485 P.3d 1265, 1268.

Defendant's other arguments—that Ms. Reeb could "unwittingly" encourage fellow legislators to continue funding the prosecution; that future district attorneys could curry favor with legislators by appointing them as special prosecutors; or that special prosecutors could prosecute prominent defendants associated with an opposing faction within the Legislature—are purely hypothetical and demonstrate the limb Defendant must climb out on in order to allege some sort of "encroachment or interference."

Disqualification of a special prosecutor on constitutional grounds is a severe remedy and cannot be supported by the imaginative but unsupported theories set out in Defendant's Motion. The State therefore respectfully requests that Defendant's Motion be denied.

/s/ Mary Carmack-Altwies
Mary Carmack-Altwies
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CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered, by and through the electronic services through Odyssey, a true and correct copy of the foregoing pleading to defense counsel, Heather LeBlanc, Luke Nikas, Alex Spiro, Jason Bowles, Todd Bullion, and Lisa Torracco, on this 6th day of March, 2023.

/s/ Mary Carmack-Altvies

District Attorney