IN THE EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF UNION
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,

v.

NO. CR 2008-25

WAYNE BENT,
Defendant.

MOTION TO DISMISS
ORDER TO SHOW CAUSE v. JUSTIN LEA
AND FOR SANCTIONS

Justin Lea, through his attorney Alan Maestas, asks the court to dismiss the matter for lack of jurisdiction and to order the Eighth Judicial District Attorney's Office to pay the attorney fees and cost associated with this matter. In support of this motion defendant states as follows.

Relevant Facts

1. On October 30, 2008 the State requested that the Court issue an order compelling Justin Lea, Esq. to appear before the court and explain why he should not be held in contempt.
2. The motion seeking the order to show cause was orally made by Andy Malone, Esq, a member of the Eight Judicial District Attorney's office. Upon information and belief, Mr. Malone was ordered by Donald Gallegos and or Daniel Romero to make the motion.
3. The Order to Show Cause alleges "for impermissible contact with a State's witness."

4. The alleged justification for the oral motion to show cause was a series of email contacts between Justin Lea, an attorney with the Firm of Maestas & Boothby, PC and [redacted] AKA Healed.

5. According to reports from people attending the court hearing, the State alleged potential witness tampering and a violation of the Rules of Professional responsibility (soliciting clients) by Justin Lea.

6. The email string is attached as Exhibit A.

7. This email string is, on its face, not evidence of witness tampering or of solicitation. Even taken out of context, there is nothing criminal or ethically impermissible with the contact contained in the emails.

8. In context, it is apparent that the District Attorneys' office has violated the Rule 11-308 Special Responsibilities of a Prosecutor.

9. This matter begins with a letter dated June 25, 2008. The letter was written by [redacted], aka Healed, to Tomas Benavidez, the Deputy District Attorney in Clayton, New Mexico.

10. The letter, at exhibit B, is a direct repudiation of the State's theory of the case against Wayne Bent and a passionate plea for justice.

11. A copy of that letter June 25, 2008 letter was emailed to the Firm of Maestas & Boothby on October 16, 2008.

12. On October 16, 2008, the Firm of Maestas & Boothby P.C. also received a phone call from an attorney wondering if the Firm could do a pro bono representation of [redacted]

13. The request for pro bono assistance was made to Alan Maestas, the managing partner of the Firm.

14. Mr. Maestas passed the request to Justin Lea and provided him guidance. The guidance was to make contact with [redacted] and offer to counsel her on her rights as a child and as a witness.

15. On October 20, 2008, before Mr. Lea contacted [redacted] the Firm of Maestas & Boothby PC received another letter written by [redacted] This letter too was addressed to Deputy District Attorney Tomas Benevidez.

16. The letter attached as exhibit C clearly indicates that [redacted] does not want to be a witness in the trial against Mr. Bent and her reluctance to have an evaluation done. This letter too discussed [redacted] heartfelt belief that what the State seeks to compel is against her moral beliefs.

17. Again the letter reiterates that there was nothing sexual about the touching.

18. The two letters together make it clear that the State's case against Mr. Bent is based on factual assertions and theories that are not supported by the witness's statements.

19. On Sunday, October 26, Alan Maestas received an email from an attorney in Albuquerque inquiring over whether the Firm of Maestas & Boothby, PC could do pro bono work on behalf of some people in Strong City, N.M.

20. The assertions presented to Mr. Maestas were that the State sought to get members of Strong City civilly committed to the State Hospital in Las Vegas.

21. Later it was learned that Tomas Benavidez had sent out "Notices for Statements" seeking to compel seven residents of Strong City to appear in the District Attorney's office to give statements.

22. Jeff Bent, the son of Wayne Bent contacted Mr. Maestas sought his help on behalf of the ladies.

23. Mr. Maestas prepared motions seeking orders of protection for the seven ladies and a notice of non-appearance at the time requested by the State.

24. The basis for the motion for order of protection was that none of the ladies were on the witness list, there was no indication of what information the District Attorney sought and that the notices (which appeared to be subpoenas) were intended only to harass and annoy.

25. A copy of the motion for order of protection is attached as Exhibit D.

26. The motions for orders of protection were filed on October 29, 2008 – the date before the State sought the order to show cause.

27. On the morning of October 30, 2008 Mr. Maestas called Senior Trial Prosecutor Emilio Chavez about the motions for order of protection. Mr. Maestas was told that the State would withdraw the notices and not seek to interview the seven ladies.

28. The withdrawal of the notices of intent to take statements lends credence to the idea that the notices had no viable purpose – if the information sought was important, it would have been a simple matter to explain the purpose of the notices to the court and the court could have denied the order of protection.

29. Instead, the State sought an order to show cause to prevent Mr. Lea from providing [redacted] with legal counsel about her rights.

30. In short, the State moved to prevent [redacted] from having counsel to assist her in obtaining what she had clearly expressed to Tomas Benavidez by letter.

The Law of Contempt Requires that the Order be Dismissed because the Court lacks jurisdiction

New Mexico courts have consistently recognized that indirect contempt, which requires factfinding beyond the kind of total knowledge of the charging judge, is like a traditional criminal proceeding. *State v. Stout*, 100 N.M. 472, 672 P.2d 645 (1983). The United States Supreme Court has repeatedly held that criminal contempt is a crime, carrying with it the procedural protections of criminal cases. *Bloom v. Illinois*, 391 U.S. 194 (1968) As such, the procedural protections including the right to specification of the charges, legally sufficient notice and hearing, the presumption of innocence, proof of the commission of the offense beyond a reasonable doubt and proof of a "criminal" state of mind.

The Court lacks jurisdiction if the motion for an order to show cause is not verified or supported by factual allegations made under oath. *See In Re Fullen*, 17 N.M. 394, 128 P. 64 (1912); *State v. Clark*, 56 N.M. 1, 518 P.2d 960 (1952); *Escobedo v. Agriculture Prods. Co.*, 86 N.M. 466, 525 P.2d 393 (Ct.App. 1974). In this case, there is no evidence available to the Defendant that the motion was made by verified motion, supported by affidavit or that the accusations were made under oath. The court lacks jurisdiction.

Defendant has a right to a hearing where the rules of evidence apply. *See State v. Watson*, 82 N.M. 769, 487 P.2d 197 (Ct.App. 1971)

Defendant has a right to call witnesses, including the right to call the judge to the stand. *State v. Pothier & Cade*, 104 N.M. 363, 721 P.2d 1294 (1986)

Defendant has a right of confrontation. *In re Byrnes*, 2002-NMCA-102. In this case it is not apparent who is making the accusation because no accuser has provided a verified petition or an affidavit.

The accuser has to prove "mens rea." *State v. Rivera*, 1998-NMSC-024 (holding that negligence in breach of a lawyer's obligations as an officer of the court does not support the court's power to punish him for criminal contempt." In this case, it is obvious that Mr. Lea was acting in a manner consistent with the lawyer's obligations. See e.g. Rule 16-701, State Bar Task Force Comments ("It is the avowed duty of every lawyer to assist in making legal services available to the public. The legal profession should assist the public in recognizing legal problems because such may not be self revealing or timely notices, especially by those of low to moderate income and educational levels.")

The Child Has a Right to Counsel

The Children's Code, while not directly addressing the right of a child to counsel when designated as an alleged victim in a criminal case, provides guidance on the State's public policy regarding legal counsel for children.

NMSA §32A-1-16 provides the outline of the basic rights of children. The child has a right to the same basic rights as an adult, except as otherwise provided in the Childrens' Code. These rights are within the context of the purpose of the Children's Code, "to provide for the care, protection and wholesome mental and physical development of children . . ." The Child's health and safety are the paramount concern.

In this case, the child has expressed a deep desire to avoid having to testify. The State has taken the position that the child should not have counsel. Assuming, for sake of illustration, that the child takes the stand and refuses to testify as the District Attorney wishes, the child could face charges of perjury, obstruction of justice, or may be held in contempt of court.

Only legal counsel for the child can be without bias or prejudice because only the child's own attorney has loyalties only to the child. The District Attorney's office has the State for a client and a built in need to have the child testify in a particular way. Counsel for Wayne Bent has duty of loyalty to her client. The Court cannot counsel a witness in a trial in which the Judge is presiding. Moreover, it is only with the Child's counsel that the child can be free to express facts honestly, secure in the knowledge that the attorney-client privilege protects her from embarrassment, condemnation or possible criminal charges.

There was no impermissible Contact with a State's witness

The allegation of impermissible contact with a "State's witness" has to begin with the issue of what control or supervision the State has over a witness. The simple answer is "none." *Gregory v. United States*, 369 F.2d 185 (C.A.D.C. 1966) (Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense)

While the State can prosecute for witness tampering, subornation of perjury, or obstruction of justice, they cannot and do not have a right to control who a witness may speak with or when.

Thus, the first issue that the court must address is what the State specifically alleges. This issue must contain sufficient specificity that Mr. Lea has an opportunity to prepare a defense. *Norton v. Reese*, 76 N.M. 602, 417 P.2d 205 (1966) (If the charges are not sufficiently specific, there is a right to further specification through a bill of particulars.)

Here a vague accusation requires that the State allege specific wrongdoing. It has not done so, and thus the Order to Show Cause should be dismissed.

The State had a self serving purpose in making the unfounded allegations.

The District Attorney's office, under Rule 16-308, is required to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. In this case, the two letters written by [redacted] raises questions about whether the State is seeking prosecute a case that it knows is unsupported.

The District Attorney's office, under Rule 16-308, has the responsibility of a minister of justice. This responsibility requires that the defendant be accorded due process and is convicted on the basis of sufficient evidence. By acting to prevent Ms. [redacted] from having counsel to explain her legal rights, the State is blatantly attempting to skew the case against Mr. Bent.

The District Attorney's office, under Rule 16-304 may not unlawfully obstruct another party's access to evidence and may not "request that a person refrain from voluntarily giving relevant information to another party." By precluding Ms. [redacted] from having counsel, the State puts Ms. [redacted] in a position where her statements and her ability to explain her position is restricted to what the State seeks to obtain from her and present only what the State seeks to introduce.

The State's motion for an order to show cause smacks of retaliation against the Firm of Maestas & Boothby, P.C. for having prevented the State from annoying and harassing seven ladies from Strong City. This retaliation, if true, is an indirect assault on every citizen's right to counsel.

The State's actions are a violation of Rule 1-11

Rule 1-011 is intended to deter baseless filings by testing the conduct of the attorneys. *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 111 P.2d 955 (1991) The rule places a moral obligation on the attorney to satisfy himself that there are good grounds for an action and requires honesty and good faith in pleadings. *Id.*

Courts have held that "the most precious asset of an attorney is his professional reputation" and that a "formal order of sanction tarnishes an attorney's professional reputation." *1-10 Industry Associates, LLC v. United States and Michael Francis Kiely*, 2008 U.S. App. Lexis 10786.

Courts, in reviewing motions and orders for sanctions, have applied the objective reasonableness standard. These courts have pointed out that the test of reasonableness under the circumstances requires an examination of the context of the attorney's acts. *White v. Gen. Motors Corp. Inc.*, 908 F.2d. 675, 680 (10th Cir. 1990)

In this case, the State's actions are baseless. The State sought to attack the most precious asset of an attorney without even a cursory investigation, conducted the attack at a hearing where the attorney was not present, and lacked even the courtesy of phoning the attorney to inform the attorney of what the State had done. In seeking to sanction the attorney, the State presented an innocuous email, alleged misconduct of the highest order, and deliberately withheld from the court the context of the emails.

The withholding of information from which the court could make an informed determination is a violation of NMRA Rule 16-303. Rule 16-303D demands that lawyers, in *ex parte* proceedings, disclose to a tribunal all material facts known to the lawyer which will enable the tribunal an informed decision.

The Order to Show Cause Requires s a New Proceeding

The requirement that Justin Lea appear before the court in a contempt proceeding is the institution of a new case, involving the determination of new and different issues of fact and law. *Lindsey v. Martinez*, 90 N.M. 737 (Ct.App.1977) In the new proceeding, the State and Mr. Lea are the new parties.

Absent the initiation of a new proceeding, the court lacks jurisdiction and has no power to punish. *Id.*

Summary and Prayer for Relief

The actions of Justin Lea, Esquire were admirable and totally in keeping with the highest standards of his profession. In contrast, the actions of the District Attorney's office were violations of several rules of professional responsibility, were intended to prevent a full and fair hearing for Mr. Bent, and were flagrant attempts to prevent Ms. [redacted] from having legal counsel inform her of her rights.

Respectfully Submitted,
Maestas & Boothby, P.C.

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CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing to opposing counsel of record Emilio Chavez, Esq. at The Office of the District Attorney, 920 Salazar Road, Suite A, Taos, New Mexico 87571 on November 4, 2008.

ALAN MAESTAS