


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. _____

S-1-SC-36879

STATE OF NEW MEXICO, *ex rel.*
NEW MEXICO JUDICIAL STANDARDS COMMISSION,

Petitioners,

v.

HON. TRUDY REED-CHASE
HON. BARRY SHARER,
LORI PROCTOR AND AMY VERHULST,

Respondents.

**VERIFIED PETITION FOR WRIT OF PROHIBITION OR
WRIT OF SUPERINTENDING CONTROL AND
REQUEST FOR EMERGENCY STAY**

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The State of New Mexico, *ex rel.* New Mexico Judicial Standards Commission, pursuant to Rule 12-504, NMRA, petitions the Court for a Writ of Prohibition or Writ of Superintending Control and a Request for an Emergency Stay to prohibit the Eleventh Judicial District Court from exercising jurisdiction in a civil matter over which only this Court has jurisdiction.

I. JURISDICTION

Pursuant to N.M. Const. art. VI, §§ 3 and 32 the Supreme Court has original jurisdiction in cases of writs of prohibition and superintending control and sole jurisdiction over matters before the Judicial Standards Commission.

II. PARTIES

Petitioner is the Judicial Standards Commission of New Mexico. Pursuant to N.M. Const. art. VI, § 32, Petitioner is an Agency of the State of New Mexico.

Respondents are two (2) Magistrate Judges in San Juan County, New Mexico, and two (2) employees of the Magistrate Court, San Juan County, New Mexico.

III. RECORDINGS REQUESTED

Respondent speculates and presumes that Petitioner obtained and possesses the recordings at issue. Petitioner cannot confirm whether it possesses the recordings at issue without violating the plain language of Article VI, Section 32. Granting this Petition would prohibit the Eleventh Judicial District Court from exceeding its jurisdiction and preserve the constitutional mandate that all proceedings before and all material filed with the Judicial Standards Commission are confidential unless filed with the Supreme Court and such filing was: (1) part of a trial record; or (2) unsealed by order of the Court pursuant to NMRA Rule 27-104(B).

IV. INTRODUCTION

Respondents attempted to intervene in the judicial disciplinary matters styled *In the Matter of Hon. Connie Lee Johnston*, S-1-SC-35625, *Inquiry Concerning Hon. Connie Lee Johnston*, JSC Inquiry Nos. 2015-058, 2015-059, 2015-060, 2015-061, 2015-062, 2015-063, 2015-098, 2015-143, 2015-146 for the purpose of seeking recovery or relinquishment of alleged secret recordings held by the Judicial Standards Commission (*hereinafter*, “Petitioner” or “Commission”). The recordings were allegedly made by Judge Connie Lee Johnston while she was serving as a Magistrate Judge in San Juan County, New Mexico.

More specifically, on September 13, 2017, Respondents filed a *Motion to Intervene to Compel the Judicial Standards Commission to Relinquish Secret Recordings or, in the Alternative, Verified Petition for Writ of Superintending Control*. This Court denied the Motion.

As well, on December 12, 2017, Respondents initiated a *Verified Petition for a Writ of Superintending Control* seeking the same relief, which this Honorable Court also denied. *The Honorable Trudy Reed-Chase et al. v. Judicial Standards Commission*, S-1-SC-36787.

On January 4, 2018, Respondents filed a civil complaint against the Commission in the Eleventh Judicial District Court for restitution of recordings. (See **Exhibit 1**). In their civil complaint against Petitioner, Respondents seek to have the District Court order the Commission to “relinquish” all secret recordings Respondents previously sought in S-1-SC-35625 and S-1-SC-36787. However, the district court cannot issue such an order. The district court does not have jurisdiction over matters involving the

Commission. Therefore, the Commission requests that this Court issue its Writ of Prohibition or of Superintending Control, along with a stay of the Eleventh Judicial District Court matter.

V. PROCEDURAL HISTORY

A. Respondents submitted a letter to the Commission on April 14, 2017 asking for the Commission to turn over recordings pursuant to Section 30-12-1, a criminal statute, Interference with Communications. (See **Exhibit 2**). Executive Director and General Counsel of the Commission, Randall D. Roybal, responded that the criminal statute did not override the provisions of the New Mexico Constitution that govern confidentiality of matters before the Commission. (See **Exhibit 3**).

B. On September 13, 2017, Intervenors (Hon. Trudy Reed-Chase, Hon. Barry Sharer, Lori Proctor, Amy Verhulst, Samantha Smith, Cruzita Garcia, Paige Miles, Elizabeth Wallace, Rebecca Stotts, Kristine Kerschion, and Rebecca Eldridge) through attorney H. Steven Murphy, filed a *Motion to Intervene to Compel the Judicial Standards Commission to Relinquish Secret Recordings or, in the Alternative, Verified Petition for Writ of Superintending Control (Motion)* (See **Exhibit 4**; S-1-SC-35625).

C. October 15, 2017, Gary C. Mitchell, attorney for Hon. Connie Lee Johnston, filed a response to Intervenors' *Motion*. (See **Exhibit 5**).

D. October 16, 2017, the Commission filed a response to Intervenors' *Motion*. (See **Exhibit 6**).

- E. October 17, 2017, Intervenors filed a reply to the Commission's and Judge Johnston's response which was filed by her attorney, Gary C. Mitchell.
- F. October 19, 2017, Intervenors filed a *Motion for Leave to File a Reply*. (See **Exhibit 7**).
- G. October 20, 2017, Hon. Connie Lee Johnston, on her own behalf, filed a response to the *Motion*. (See **Exhibit 8**).
- H. October 23, 2017, New Mexico Supreme Court issued an order denying Intervenors' *Motion*. (See **Exhibit 9**).
- I. December 12, 2017, Petitioners (Hon. Barry Sharer, Hon. Trudy Reed-Chase, Amy Verhulst, and Lori Proctor) then filed a *Verified Petition For Writ of Superintending Control* (S-SC-1-36787). (See **Exhibit 10**).
- J. December 14, 2017, New Mexico Supreme Court issued an order denying Petitioners' *Verified Petition for Writ of Superintending Control*. (See **Exhibit 11**).
- K. January 4, 2018, Plaintiffs (Hon. Trudy Reed-Chase, Hon. Barry Sharer, Lori Proctor and Amy Verhulst) filed a *Civil Complaint for Restitution Of Recordings*, in the Eleventh Judicial District Court (D-1116-CV-2018-00019). (See **Exhibit 1**).
- L. January 19, 2018, Plaintiffs served Joyce Bustos, Chair of the Judicial Standards Commission, and Randall D. Roybal, Executive Director of the Judicial Standards Commission, with the civil complaint. (See **Exhibit 12**).

VI. BACKGROUND

A. Respondents were witnesses in *In the Matter of Hon. Connie Lee Johnston* (hereinafter “Judge Johnston” or “Ms. Johnston”), S-1-SC-35625, involving, *inter alia*, Judge Johnston’s finding of direct criminal contempt against Aztec Magistrate Court Lead Worker Amy Verhulst.

B. A hearing on the merits was held December 5-9, 2016. The Commission found that Judge Johnston committed willful misconduct in office and recommended her permanent removal from judicial office. Judge Johnston was permanently removed from judicial office pursuant to this Court’s Order filed on October 23, 2017.

C. Examiner for the Commission, Phyllis A. Dominguez (Examiner), initially introduced only one recording at the merits hearing which was not obtained from or provided by Judge Johnston, and which did not contain any personal, private or confidential information regarding Respondents.

D. Respondent’s attorney, H. Steven Murphy, Esq., disclosed the recording to Examiner during the discovery process. Mr. Murphy represented Ms. Verhulst on December 1, 2015 when he appeared before Judge Johnston to question the order of contempt, which formed the basis of the original inquiry before the Commission. Mr. Murphy testified at the merits hearing that he had his cell phone in his pocket and turned the cell phone recorder on prior to entering the courtroom. Mr.

Murphy testified that he recorded the hearing because he was concerned that Judge Johnston would hold him in contempt.

E. Mr. Murphy gave the recording to Examiner, which was then disclosed to Judge Johnston as part of the discovery process.

F. During the hearing on the merits, Examiner played Mr. Murphy's secret recording. Judge Johnston objected and stated that she had a better recording of the events of December 1, 2015. Judge Johnston then gave her recording to Examiner, which was played before the Commission. The recording did not include any personal, private, or confidential information regarding Respondents. Both recordings were filed with this Court and are available to the public. No other recordings were played during the merits hearing or made part of the record in S-1-SC-35625.

G. Petitioner has filed no other recordings with the Supreme Court concerning Respondents, which would render such recordings public pursuant to Article VI, Section 32 of the New Mexico Constitution.

VII. ARGUMENT

A. There is no provision in the New Mexico Constitution that gives the Eleventh Judicial District Court jurisdiction over the Commission; and, therefore, a writ of superintending control or prohibition is appropriate to prevent the district court from acting in this matter.

The Writ of Prohibition is “an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control or

from going beyond its legitimate powers in a matter of which it has jurisdiction.” *State ex rel. Harvey v. Medler*, 1914-NMSC-055, ¶ 17, 19 N.M. 252, 258, 142 P. 376, 378.

“The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise.” *Albuquerque Gas & Elec. Co. v. Curtis*, 1938-NMSC-24 ¶ 7, 43 N.M. 234, 236, 89 P.2d 615, 616. “A Writ is appropriate when a remedy by appeal seems wholly inadequate...or where otherwise necessary to prevent irreparable mischief, great extraordinary hardship; costly delays and unusual burdens of expense.” *State ex rel. Transcon Bus Serv. v. Carmody*, 1949-NMSC-047, ¶ 23, 53 N.M. 367, 378, 208 P.2d 1073.

Original jurisdiction over the Commission, superintending control over all inferior courts and the power to issue writs is vested with the Supreme Court. N.M. Const. art. VI, § 3. The New Mexico Constitution vests the Commission with the power to investigate and make recommendations to this Court regarding the discipline, removal or retirement of a judge. N.M. Const. art. VI, § 32. All papers filed with the Commission or its masters, and proceedings before the Commission or its masters are confidential. *Id.* A record filed before the Supreme Court loses its confidential character upon filing. *Id.* As well, the Commission, under constitutional authority, has promulgated its own procedural rules. According to Commission Rule 9 NMRA 2010, neither the New Mexico Rules of Civil Procedure, nor the New Mexico Rules of Criminal Procedure govern proceedings before the Commission.

The Supreme Court has addressed a similar issue in *State of New Mexico, ex rel., New Mexico Judicial Standards Commission vs. Hon. Geraldine E. Rivera*, S-1-SC-29239. (See **Exhibit 13**). In *Rivera*, the Commission sought a writ of superintending control or prohibition to prevent Judge Rivera from quashing a subpoena lawfully issued by the Commission. The Court issued a writ of prohibition finding that the district court had no authority to quash Commission-requested subpoenas or to hold related evidentiary hearings. “Notably, the Constitution does not grant state district courts jurisdiction over any type of judicial disciplinary matters.” *Id.* at 5. The Court issued the writ and a permanent stay to end the district court’s involvement and noted that further proceedings would take place in the Commission or in the Court.

The Court not only reversed Judge Rivera’s order to quash the subpoena due to lack of the district court’s authority, but also reversed her order because of the “important constitutional requirement that Commission proceedings be confidential.” *Id.* at 7.

Here, too, all the elements necessary for issuance of the writ are established. Irreparable harm will come to Petitioner if a district court is allowed to assert jurisdiction over the Commission, including over a matter or a record that was never filed in this Court. As noted above, if the Commission possessed the recordings requested, they would remain confidential by law; the recordings sought were never part of the formal proceedings filed before this Court. Any discussion of the merits, to

include discussion of the nature of the recordings (private or otherwise), cannot be heard in the District Court, lest they violate the State Constitution.

Further, the writ is necessary to avoid the accompanying hardship and the burden of expense, particularly since this matter has already been addressed in two (2) separate Orders of this Court. *Cf. Cobb v. State Canvassing Bd.*, 2006 NMSC-034, 140 N.M. 77, 140 P.3d 498 (*citing State v. Ware*, 115 N.M. 339, 343, 850 P.2d 1042, 1046 (Ct. App. 1993) (“The denial of a writ of prohibition does not necessarily mean that the Supreme Court reached the merits of the issue argued in support of the writ, especially where there exists an adequate remedy at law.”)).

Finally, an appeal is inadequate because jurisdiction over the Commission vests solely with this Court.

In sum, a writ of superintending control or prohibition is necessary, as it was in *Rivera*, to prohibit the Eleventh Judicial District Court from exceeding its jurisdiction and preserve the constitutional mandate that proceedings before and all material filed with the Judicial Standards Commission are confidential unless filed with the Supreme Court and such filing was: (1) part of a trial record; or (2) unsealed by order of the Court pursuant to NMRA Rule 27-104(B).

B. The Commission has not disclosed or used Respondents’ oral communications in violation of NMSA 1978, § 30-12-11(A). If the Commission possessed such recordings, the recordings have not been made part of the record before this Court, and therefore would remain confidential.

In their Civil Complaint, Respondents state that the Commission “disclosed or used the [Respondents’] private oral communications, in violation of NMSA 1978 § 30-12-11(A).” (**Exhibit 1**, Civil Complaint, page 6, paragraph 44.) The record filed in this Court indicates that this is not the case. As stated *supra*, Examiner introduced only two (2) recordings at the hearing on the merits: a recording provided by Respondents’ attorney H. Steven Murphy, which Mr. Murphy recorded of his client’s public criminal contempt hearing, and Judge Johnston’s recordings of the same event. Again, what Respondents seek to have a district court order “relinquish” would be confidential according to the New Mexico Constitution.¹

¹ Significantly, Respondents’ attorney voluntarily released “secret” recordings to the Attorney General’s Office, which included the private oral communications which he seeks to have the Commission “relinquish.” (See **Exhibit 14**, Criminal Complaint and Summons, *State of New Mexico v. Connie Lee Johnston*, D-1116-CR-2017-00677). The criminal complaint filed by the Attorney General’s Office against Ms. Johnston states on page three (3), paragraph five (5): “On February 14, 2017, a USB drive containing audio recordings and document/test files was received by the New Mexico Attorney General’s Office from H. Steven Murphy, the attorney for the Plaintiffs in the civil lawsuit. In the accompanying letter Mr. Murphy notes that the files were obtained from Connie Johnston *pursuant to a District Court discovery order.*”

VIII. REQUEST FOR STAY

Pursuant to Rule 12-504(D), NMRA, Petitioner respectfully requests a Stay of the proceedings in the Eleventh Judicial District Court. Respondents have filed a civil complaint seeking an order directing the Commission to relinquish what is confidential as a matter of State Constitutional law, if the Commission possessed such recordings. Petitioner will suffer irreparable harm unless the relief sought in the Writ is granted, as jurisdiction would be improperly vested in the District Court. Further, Respondents have already provided the alleged secret recordings to the Attorney General, so they are presumably already in possession of the recordings they seek. The Commission is constitutionally bound to keep any recordings not part of the public record on file with this Court confidential. Therefore, no loss or damage will result to Respondents by granting this petition.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Supreme Court issue its Writ of Prohibition or of Superintending Control prohibiting the Eleventh Judicial District Court from exercising jurisdiction over Respondents' civil complaint and issuing an emergency order staying proceedings until this matter can be heard by this Court.

Respectfully submitted:

/s/Daniel J. Macke, 02/09/2018

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VERIFICATION

I, Randall D. Roybal, Executive Director & General Counsel for Petitioner, being first duly sworn, state that the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.



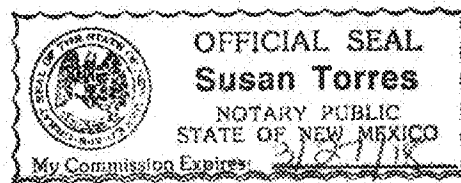
Randall D. Roybal
Executive Director & General Counsel

The foregoing was signed, sworn to, and acknowledged before me this 9th day of February, 2018, by Randall D. Roybal.

Notary Public:



My Commission Expires: 3/27/18



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Verified Petition for Writ of Prohibition or Writ of Superintending Control and Request for Emergency Stay* was filed with the New Mexico Supreme Court and mailed to the following parties on this 9th day of February, 2018:

H. Steven Murphy
Titus & Murphy PC
Attorney for Respondents
4000 E. 30th Street
Farmington, NM 87402

/s/ Daniel J. Macke, 02/09/2018
Daniel J. Macke