

1 CODE 1642
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12
13 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
14
15 IN AND FOR THE COUNTY OF WASHOE

16 THE STATE OF NEVADA,

17 Plaintiff,

18 vs.

19 STEWART EVANS HANDTE,

20 Defendant.

21 Case No. CR19-1535B

22 Dept. No. 8

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26
MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR
DISQUALIFICATION OF THE WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE

27 Defendant STEWART EVANS HANDTE, by and through Counsel, Ian
28 Silverberg, Alternate Public Defender, and moves the Court for an Order of
29 Dismissal based upon outrageous governmental conduct, or in the alternative, that
30 the Washo County District Attorney's Office be disqualified from the prosecution of
31 this matter.

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This Motion is made and based upon the following Points and Authorities.

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DATED this 19th day of September, 2023

MARC PICKER
Washoe County Alternate Public Defender

By: /s/ Ian Silverberg
Ian Silverberg, Esq.
Deputy Alternate Public Defender

1 POINTS AND AUTHORITIES

2 In this case in which the Defendant is charged with Conspiracy to Commit
3 Second Degree Kidnapping, a violation of NRS 199.480 and NRS 200.310.2, a category
4 B felony; Burglary, a violation of NRS 205.060, a category B felony; and, Second Degree
5 Kidnapping of an Older or Vulnerable Person, a violation of NRS 200.310.2 and NRS
6 193.167, a category B felony.
7

8 At a hearing on the Motion to Confirm Trial in this matter, the court inquired
9 as to whether or not any offers had been made to resolve the prosecution of this case.
10

11 After a brief recess it appeared that the parties were “close” to resolving the
12 case, and after a thorough canvas by the Court to ensure resolution was realistic, the
13 Court agreed to postpone trial, which was due to commence just days after the Motion
14 to Confirm hearing. It should also be noted that the Court was extremely reluctant to
15 continue the trial in this matter.
16

17 A settlement conference was then set by the Court pursuant to Supreme Court
18 Rule 252, in front of the Honorable Judge Hardy. The parties convened for nearly six
19 hours, hammering out the details of the negotiations, and at the end, the parties did,
20 in fact, reach a resolution. The parties were ordered to appear in Department 8 the
21 following morning for a change of plea hearing.
22

23 The morning of that hearing the undersigned was informed by Counsel for Mr.
24 Hilygus that he had been contacted by DDA Stege, who informed Mr. Goodnight that
25 he, DDA Stege, refused to put language in the guilty plea memorandum that, pursuant
26 to Rule 252, if the Court does not follow negotiations, the Defendants are free to

1 withdraw their pleas. (Ex. 1 and 2) The State further indicated that it had no
2 intention of being bound by that Rule, and that if the Defendants want the benefit of
3 Rule 252, that would, in fact, change the negotiations and require pleas to additional
4 charges, despite the fact that the Court made it clear the settlement conference was
5 being held pursuant to Rule 252.

6 DDA Stege offered no explanation for his change of position other than to
7 indicate he was looking out for his interests or words to that effect made to the
8 undersigned.
9

10 The Court can only imagine the effect this event has had on the Defendants,
11 who, as the Court knows, are quite suspicious of the judicial proceedings they are
12 facing.

13 It is respectfully submitted that the actions of the District Attorney in this case
14 rise to the level of prosecutorial misconduct and outrageous governmental conduct and
15 thus a denial of due process for Mr. Handte, and that on that basis the court can and
16 should dismiss this case.
17

18 I – PROSECUTORIAL MISCONDUCT

19 It is important for purposes of this motion to point out the very special duty of
20 a prosecutor.
21

22 “The prosecutor has a “sworn duty ... to assure that the defendant
23 has a fair and impartial trial,” and his “interest in a particular case is
24 not necessarily to win, but to do justice.” *N. Mariana Islands v. Bowie*,
25 236 F.3d 1083, 1089 (9th Cir.2001)” *United States v. Chapman*, 524 F.3d
26 1073, 1088 (9th Cir. 2008)

1 It is respectfully submitted that the lines in this case have been blurred by the
2 State's' handling of this matter.

3 It is further submitted that the actions of the State described above rise to the
4 level of prosecutorial misconduct and warrant dismissal of this case.

5 "Dismissal under the court's supervisory powers for prosecutorial
6 misconduct requires (1) flagrant misbehavior and (2) substantial
7 prejudice. *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir.1988) (per
8 curiam)." *United States v. Kearns*, 5 F.3d 1251, 1253-54 (9th Cir. 1993)

9 In this matter it is respectfully submitted that the conduct of the State, after
10 hours of negotiations, to then come to court and boldly state it has no intention of being
11 bound by Rule 252, the very rule upon which the Court ordered the settlement
12 conference, rises to the level of "flagrant misbehavior."

13 Conducting itself in a manner in which the rules do not apply to it, but only to
14 those facing prosecution, undercuts faith in our system of justice, and such behavior
15 requires a strong response from the Court.
16

17 "Under its inherent supervisory powers, a federal court is
18 empowered to dismiss an indictment on the basis of governmental
19 misconduct. See generally *United States v. Baskes*, 433 F.Supp. 799, 804-
20 07 (N.D.Ill.1967). As such, dismissal is used as a prophylactic tool for
21 discouraging future deliberate governmental impropriety of a similar
22 nature. *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4
23 L.Ed.2d 1669 (1960); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st
24 Cir. 1977), Cert. den., 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977).
25 However, these supervisory powers "remain a harsh, ultimate sanction
26 (which) are more often referred to than invoked." *United States v. Baskes*,
433 F.Supp. at 806. Cf. *United States v. Russell*, 411 U.S. 423, 431-32, 93
S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973) ("(W)e may someday be
presented with a situation in which the conduct of law enforcement
agents is so outrageous that due process principles would absolutely bar
the government from invoking judicial processes to obtain a conviction")."
United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978)

1 It is respectfully submitted that the facts of this case rise to the level the *Owens*
2 Court mentioned, that the conduct of law enforcement (the State) is so outrageous that
3 due process should not only mandate dismissal, but that this dismissal be with
4 prejudice.

5 As stated above, the Court can only imagine the effect this gamesmanship has
6 had on Defendant HANDTE, but also the attorney-client relationship as a whole, as it
7 was the undersigned who very much advocated for the settlement conference, and that
8 process, unfortunately, was marred by the State's unjustifiable actions after the
9 settlement conference.
10

11 To the extent the Court find dismissal with prejudice not appropriate, then the
12 Court should dismiss without prejudice and disqualify the District Attorney's office
13 from further prosecution in this matter as that office has shown itself to not meet the
14 standard of "doing justice" as it relates to Mr. Handte.
15

16 "The Supreme Court has summarized the rules controlling
17 disqualification of a prosecutor, as follows: "The standard for a motion
18 to disqualify the prosecutor is set forth in Penal Code section 1424: "The
19 motion may not be granted unless the evidence shows that a conflict of
20 interest exists that would render it unlikely that the defendant would
21 receive a fair trial.' We detailed the history of this statute and the
22 associated legal principles in [*People v. Eubanks* (1996) 14 Cal.4th 580],
23 where we explained that a 'conflict,' for purposes of section 1424, "exists
24 whenever the circumstances of a case evidence a reasonable possibility
25 that the DA's office may not exercise its discretionary function in an
26 evenhanded manner." " [Citation.] However, 'the conflict is disabling only
if it is "so grave as to render it unlikely that defendant will receive fair
treatment" ' during all portions of the criminal proceedings. [Citation.]
The statute thus articulates a two-part test: '(i) is there a conflict of
interest?; and (ii) is the conflict so severe as to disqualify the district
attorney from acting?' [Citation.]" (*Hambarian v. Superior Court* (2002)
27 Cal.4th 826, 833, 118 Cal.Rptr.2d 725, 44 P.3d 102, fn. omitted,
emphasis added.)" *People v. Black*, F042592, 2004 WL 1202342, at *5
(Cal. Ct. App. June 1, 2004), as modified on denial of reh'g (June 28,

1 2004), aff'd, 35 Cal. 4th 1238 (2005), cert. granted, judgment vacated sub
2 nom. *Black v. California*, 127 S. Ct. 1210 (2007)

3 As applied to the instant case, the actions of the Washoe County District
4 Attorney's office, as relating to the handling of Mr. HANDTE's case, have shown a
5 disabling conflict in that the office appears to be incapable or unwilling to provide fair
6 treatment to Mr. HANDTE at all portions of the criminal proceeding, including, but
7 not limited to, the settlement conference that was ordered by the Court in this matter
8 and in which the parties were expected to participate in good faith.
9

10 It is respectfully provided as a further basis for the requested relief that the
11 State's conduct in this case rises to a level of Outrageous Governmental Conduct.

12 "An indictment should be dismissed for outrageous governmental
13 conduct only where the government's conduct is "so grossly shocking and
14 so outrageous as to violate the universal sense of justice." *United States*
15 *v. Citro*, 842 F.2d 1149, 1152 (9th Cir.), cert. denied, 488 U.S. 866, 109
16 S.Ct. 170, 102 L.Ed.2d 140 (1988)." *United States v. Slaughter*, 891 F.2d
17 691, 695 (9th Cir. 1989)

18 Given the tortured history of this case leading up to the settlement conference,
19 it is absolutely shocking and outrageous that the State, after hours of working on a
20 just resolution of this case, would then announce it has no intention of being bound by
21 Rule 252, the very rule employed by the Court to order the settlement conference.

22 Based upon the foregoing it is respectfully requested the Court dismiss this
23 matter with prejudice, or in the alternative, that the Court dismiss without prejudice
24 and disqualify the Washoe County District Attorney's office from the prosecution of
25 this case.
26

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 19th day of September, 2023

MARC PICKER
Washoe County Alternate Public Defender

By: /s/ Ian Silverberg
Ian Silverberg, Esq.
Deputy Alternate Public Defender

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INDEX OF EXHIBITS

Exhibit No.	Description	No. of Pages
1	Nolo Contendere Plea Memorandum - Handte	7
2	Nolo Contendere Plea Memorandum – Hillygus	7

CERTIFICATE OF SERVICE

1 I hereby certify that I am an employee of the Washoe County Public
2 Defender's Office, Reno, Washoe County, Nevada, and that on this date
3 electronically filed the foregoing with the Clerk of the Court by using the ECF
4 system which will send a notice of electronic filing to the following:
5

6 Amos Stege, Deputy District Attorney

7 and

8 Joe Goodnight, Deputy Public Defender for
9 Roger Hilygus

10 and

11 Roger Hilygus

12 DATED this 19th day of September, 2023

13
14 /s/ Randi Jensen
15 RANDI JENSEN
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