IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Ex rel. Kari Brandenburg,
Second Judicial District Attorney,

Petitioner

vs.

No. 33,807
Bernalillo County
No. GJ 2012-002

THE HONORABLE STAN WHITAKER,
District Court Judge, Second Judicial District Court

Respondent,

and

DAVID C. FLORY
F. CHRIS GARCIA,

Real Parties in Interest.

COVER SHEET FOR

REAL PARTIES IN INTEREST'S JOINT RESPONSE TO SEALED VERIFIED PETITION FOR PEREMPTORY WRIT OF SUPERINTENDING CONTROL

The enclosed court record is subject to a pending motion to seal.

Respectfully submitted by:

Theresa M. Duncan
Duncan Earnest, LLC
600 Central Ave SE, Suite 204
Albuquerque, NM 87102
505-842-5196

Attorney for David C. Flory

Robert Gorence
Gorence & Oliveros, P.C.
1305 Tijeras Ave NW
Albuquerque, NM 87102
505-244-0214

Attorney for F. Chris Garcia

IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Ex rel. Kari Brandenburg,
Second Judicial District Attorney,

Petitioner

vs.

No. 33,807
Bernalillo County
GJ 2012-002

THE HONORABLE STAN WHITAKER,
District Court Judge, Second Judicial District Court

Respondent,

and

DAVID C. FLORY
F. CHRIS GARCIA,

Real Parties in Interest.

REAL PARTIES IN INTEREST'S JOINT RESPONSE TO SEALED VERIFIED PETITION FOR PEREMPTORY WRIT OF SUPERINTENDING CONTROL

Respectfully submitted by:

Theresa M. Duncan
Duncan Earnest, LLC
600 Central Ave SE, Suite 204
Albuquerque, NM 87102
505-842-5196

Attorney for David C. Flory

Robert Gorence
Gorence & Oliveros, P.C.
1305 Tijeras Ave NW
Albuquerque, NM 87102
505-244-0214

Attorney for F. Chris Garcia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

OTHER CASES

STATUTES

RULES

OTHER AUTHORITIES

Real Parties in Interest David C. Flory and F. Chris Garcia respectfully ask the Court to summarily dismiss the State's Sealed Verified Petition for Peremptory Writ of Superintending Control (Petition) on the grounds that (1) having been filed nearly three months after entry of the order at issue, the Petition is untimely, (2) the Grand Jury Judge acted well within his authority in ordering the State to properly instruct the Grand Jury on the law applicable to the offenses charged, and (3) the instruction at issue correctly states current New Mexico law.[1]

I. PROCEDURAL BACKGROUND

On June 19, 2011, the state filed a complaint charging David C. Flory with 40 counts of promoting prostitution, contrary to NMSA 1978, § 30-9-4(A). *See* Petition, Ex. 2(A). The charges were based upon Dr. Flory's alleged management of a website, www.southwestcompanions.info, which the complaint describes as an online message board where alleged prostitutes and patrons discussed various prostitution-related topics. The complaint explained that the charges were premised on the legal theory that Dr. Flory "is promoting prostitution by providing the *virtual house* in which the

[1] Dr. Flory and Dr. Garcia also ask the Court to deny the state's request for a stay, which is raised for the first time in the Petition's prayer for relief. *See* Petition at 12. There are no pending proceedings in district court and, thus, a stay is unnecessary.

prostitutes reside, as well as protecting this 'house' by making all new members verify that they are not law enforcement." *Id.* at 9 (emphasis added).

On June 2, 2012, Dr. Flory and Dr. Chris Garcia received notice that they were the targets of a Grand Jury Investigation scheduled for June 18, 2012. *See* Petition, Ex. 2(B). The notices stated that the state sought to indict them on two substantive offenses and corresponding conspiracies. The substantive offenses are (1) "Promoting Prostitution (Establishing, Owning, Maintaining or Managing a House of Prostitution), occurring on or between the 7th day of May, 2010, and the 19th day of June, 2011, contrary to §30-9-04.A, NMSA 1978," and (2) "Promoting Prostitution (Procuring a Prostitute for House of Prostitution), occurring on or between the 7th day of May, 2010, and the 19th day of June, 2011, contrary to §30-9-04.C, NMSA 1978."

Given the target notice essentially alleged the same offenses as the complaint, Dr. Flory had reason to believe the state sought to indict him based on its legal theory that a website can constitute a "virtual house of prostitution" within the meaning of New Mexico law. Dr. Flory then filed a motion, which Dr. Garcia joined, asking the Grand Jury Judge to require the state to instruct the grand jury that a website or internet message board is not "a house of prostitution or place where prostitution is practiced, encouraged or allowed," and to prohibit the state from suggesting the contrary. Petition,

Ex. 2. Dr. Flory did not ask the court to dismiss the state's case, to limit the state's evidence or to prohibit the state from seeking an indictment. *Id.* at 3.

The state filed a written response to the motion, and the district court heard argument on June 15, 2012. *See* Petition, Exs. 3-4. On June 18, 2012, the district court entered an order requiring the prosecution to instruct the grand jury as follows:

> The Court has made a ruling that a website, online message board or computer is not a "house of prostitution or a place where prostitution is practiced, encouraged or allowed" within the meaning [of] NMSA 1978, § 30-9-4.

Petition, Ex. 5. Nearly three months after the district court entered its order, and over two months after the transcript of the hearing had been prepared, *see* Petition, Ex. 4 at 57, the state filed a petition challenging the order.

II. ARGUMENT

A. Having been filed nearly 87 days after the Grand Jury Judge Issued His Order, the Petition for Peremptory Writ of Superintending Control is Untimely.

The Honorable Stan Whitaker issued his order on June 18, 2012. On September 12, 2012—86 days after the order was issued—the state filed its Petition asking this Court to vacate Judge Whitaker's order. Because the state's writ is the functional equivalent of an appeal, it is untimely.

A writ of superintending control is taken when a party believes that a simple appeal will not adequately resolve an issue. This Court "has held that

the writ of superintending control is appropriate when the remedy by appeal seems wholly inadequate ... or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126 (citations omitted), quoting *State ex rel. Transcon. Bus Serv. v. Carmody*, 53 N.M. 367, 378, 208 P.2d 1073, 1080 (1949). Even though a writ of superintending control is not *per se* an appeal, in this case, it serves the same purpose as an appeal. In fact, the State's Petition in this case is the functional equivalent of an appeal, and the right to an appeal is preserved by filing a notice of appeal within *thirty days* of the judgment. *See* NMRA Rule 12–201(A)(2) (emphasis added).

An appeal taken outside of the thirty-day time limit is untimely, and "an untimely appeal will not be excused when the appellant is responsible for not filing a notice of appeal on time and there are no unusual circumstances warranting excusal." *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012 WL 3711502, *10; *see also San Juan 1990–A., L.P. v. El Paso Prod. Co.*, 2002–NMCA–041, ¶¶ 12, 26, 132 N.M. 73, 43 P.3d 1083 (refusing to excuse an untimely filing when counsel filed a notice of appeal one day late, believing that the clerk's office was closed the day the appeal was due). An untimely appeal should only be heard if (1) there is a court-

caused delay, (2) unusual circumstances are present, or (3) the appeal is only marginally untimely. *Chavez v. U–Haul Co. of N.M.*, 1997–NMSC–051, ¶ 26, 124 N.M. 165, 947 P.2d 122.

Similarly, the timeline to file a petition for writ of certiorari is also thirty days. *See* NMRA Rule 12–505(C); *see also Wakeland v. N.M. Dep't of Workforce Solutions and Gilman Law Offices, LLC*, 2012–NMCA–021, ¶¶ 18–22, 274 P.3d 766. Much like an appeal, the untimely filing of such a writ will only be excused in unusual circumstances outside the control of the parties. *Wakeland*, 2012-NMCA-021, ¶¶ 23–26; *see also Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 361, 374 (1994) (allowing an untimely appeal as long as the untimeliness was due to judicial error). An untimely petition for certiorari has also been allowed on the basis that it was only marginally late, and where exigent circumstances existed. *See Chavez*, 1997–NMSC–051, ¶¶ 21–22 (appeal should be allowed because the notice of appeal was filed only fifty-eight minutes late, the party was *pro se*, and the late *pro se* filing was partly a result of trial counsel's indecision on whether to represent the client on appeal). In that same case, however, the Court declined to extend the exception to another appellant where no unusual circumstances existed to cause him to file his appeal thirty days late. *Id.* ¶¶ 23, 25.

Because the petition for a writ of superintending control in this case is the functional equivalent of an appeal, the deadlines applicable to an appeal should apply. Further, the conditions warranting acceptance of an untimely appeal are not met in this case. The Petition was filed 86 days after the district court's order and a full two months after the completion of the transcript of the relevant hearing. The Petition contains no new arguments that were not briefed and argued below. Although the transcript is attached, the Petition does not cite to it. Under the circumstances, there is no reason the state could not have filed its Petition within (or even close to) 30 days after Judge Whitaker issued his ruling.

Although the state acknowledges that this case raises an "issue of first impression [that] is important to the public and should be resolved quickly," Petition at 4, it waited nearly three months before challenging Judge Whitaker's order. As a result, Dr. Flory and Dr. Garcia have suffered much prejudice. Both men were first implicated in this case approximately 14 months ago. Since that time, Dr. Garcia's and Dr. Flory's reputations have been thoroughly sullied, and Dr. Garcia was dismissed from his UNM position. Further, due to the unjustified delays by the state, Dr. Garcia and Dr. Flory have been unable to finally and conclusively clear their names. This type of delay and practice must be curtailed.

A delay of 86 days is inexcusable, especially when the state itself acknowledged the need for a speedy resolution of this matter. The filing of the petition is untimely and has caused both Dr. Flory and Dr. Garcia harm. As such, the state's petition should be summarily denied.

B. Judge Whitaker Not Only Had the Authority, But Also the Duty, to Order the State to Properly Instruct the Grand Jury on the Law Relevant to the Offenses to Be Considered.

Should this Court find that the State's Petition is timely, it should nonetheless dismiss it on the merits. In its Petition, the state argues that the Grand Jury Judge lacked authority to "rule on a pre-indictment *Foulenfont* motion without any stipulated facts." Petition at 6. The fundamental flaw in the State's argument is that the district court made no such ruling. The district court did not dismiss the state's case, and it did not in any way restrict the state's presentation of evidence to the grand jury or the charges the state chose to present. Rather, the court ordered the state to correctly instruct the grand jury on the law applicable to the offenses the grand jury was being asked to consider. *See* Petition, Ex. 5. Such an order was clearly within the court's authority. *See* NMRA Rule 5-302A(B)(4).

The State's Petition suggests that a grand jury judge's supervisory authority is limited to resolving disputes between the prosecution and defense regarding the presentation of evidence. Petition at 6-7. This is simply

not true. Rule 5-302A also requires a grand jury judge to decide disputes regarding the instructions to be provided to the grand jury. Rule 5-302A(C) requires the prosecution to "provide the grand jurors with instructions setting forth the elements of each offense being investigated *and the definitions of any defenses raised by the evidence*" and to "provide the grand jury with other instructions *which are necessary to the fair consideration by the grand jury of the issues presented.*" (Emphasis added.) A prosecutor may be relieved of the duty to instruct the grand jury on possible defenses only "by obtaining a court order prior to the grand jury proceeding." Rule 5-302A(B)(4). Following briefing by the parties, a grand jury judge must "give the prosecuting attorney clear direction on how to proceed before the grand jury, making a record of the decision." *Id.* In entering his order requiring the state to properly instruct the grand jury on the applicable law, Judge Whitaker did exactly what the law required and authorized him to do.

There is no question that the grand jury judge "has the power and obligation to assist the grand jury in carrying out its functions." *Jones v. Murdoch*, 2009-NMSC-002, ¶ 30, 145 N.M. 473, 200 P.3d 523. The district court is endowed with supervisory authority over the grand jury to ensure its proper functioning. *See id.* at ¶ 13 ("A court would not be justified, even if it were so inclined, to create or call into existence a grand jury, and then go off

and leave it. A supervisory duty, not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice"), quoting *In re Nat'l Window Glass Workers*, 287 F. 219, 225 (N.D. Ohio 1922); *Cook v. Smith*, 114 N.M. 41, 44-45, 834 P.2d 418, 421-22 (1992); NMRA Rule 5-302A(F)(1) ("The district court has supervisory authority over all grand jury proceedings."). This supervisory authority extends to ensuring that the grand jury's scope of inquiry is limited to investigating *criminal* conduct under New Mexico law. *See District Court v. McKenna,* 118 N.M. 402, 407, 881 P.2d 1387, 1392 (1994) ("[I]f the petition [to convene a grand jury] alleges conduct that is not proscribed by New Mexico law, inquiry into such conduct historically falls outside the purview of the grand jury."); *Cook*, 114 N.M. at 45, 834 P.2d at 422 ("Clearly a grand jury cannot be convened to investigate conduct that is not proscribed by New Mexico law[.]"). By ordering the state to properly instruct the grand jury on the applicable law, Judge Whitaker did no more than ensure that the grand jury acted within its legal authority.

In addition to arguing that a grand jury judge lacks authority to resolve legal disputes prior to a grand jury presentation, the state also suggests that Judge Whitaker exceeded his authority in interpreting the relevant statute because the legal issue presented is "novel." Petition at 4.

This argument is meritless. District court judges routinely decide novel questions of law—it is one their most fundamental functions in our justice system. Many important legal issues would never reach this Court if district court judges were prohibited from considering novel questions. Further, in this case, it was the state that sought to apply a novel—and legally unsustainable—interpretation of a long-standing statute, and Judge Whitaker was well within his authority in deciding whether that interpretation was consistent with New Mexico law. "In matters relating to the grand jury process, the prosecutor does not have discretion, and the courts do not defer to any decision the prosecutor makes if that decision is not in compliance with the law." *State v. Yaw*, 2011-NMCA-023, ¶ 11, 150 N.M. 279, 258 P.3d 1071.

Finally, the state's characterization of Judge Whitaker's order as a ruling on a pre-indictment *Foulenfont* motion evinces a misunderstanding of the order and of Dr. Flory's citation to *Foulenfont* in his briefing before the district court. *See* Petition, Ex. 2. Dr. Flory cited to *State v. Foulenfont,* 119 N.M. 788, 895 P.2d 1329 (Ct. App. 1995), solely to illustrate the differences between legal and factual issues. Petition, Ex. 4 at 18. Similarly, he cited to the facts alleged in the complaint solely as the basis for his belief that the state intended to seek indictment under the "virtual house of prostitution"

legal theory. *Id.*, Ex. 4 at 8. He never asked the court to impose *Foulenfont*'s remedy of dismissing the state's case. Furthermore, as Dr. Flory noted in his motion and during argument, the contents of the website or his computer are irrelevant to the legal issue presented here. And it is noteworthy that nowhere in its pleadings or arguments to the district court or in its Petition to this Court has the state denied its intent to proceed under the "virtual house of prostitution" legal theory.

C. Judge Whitaker Correctly Construed the Applicable Statute.

The state sought indictments against Dr. Flory and Dr. Garcia for alleged violations of NMSA 1978, § 30-9-4(A) and (C) (1981), which criminalize certain conduct in relation to "a house of prostitution or … place where prostitution is practiced, encouraged or allowed." The issue in this case is what the Legislature meant by the phrase "place where prostitution is practiced, encouraged or allowed" and whether this phrase can fairly be read to include websites, internet message boards, and computers. Judge Whitaker correctly concluded it cannot.

As the United States Supreme Court has explained, the tools of the internet—including websites, chat rooms and message boards—are methods of communication "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."

Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997). Similarly, computers are simply tools used to access cyberspace and store information. They are no more "places" than telephones, typewriters and letters. The statutory provisions Dr. Flory and Dr. Garcia allegedly violated do not speak to communications (or tools of communication) but to the management of physical places where the crime of prostitution occurs.

As Dr. Flory argued below (Petition, Ex. 2 at 5-15), the plain language of the statute—and common rules of statutory construction—make clear that the Legislature intended only to prohibit certain conduct with respect to buildings and other structures in which the crime of prostitution—that is, "knowingly engaging in or offering to engage in a sexual act for hire", *see* NMSA 1978, § 30-9-2 (1989)—occurs. *Cf. Cook v. Anding*, 2008–NMSC–035, ¶ 7, 144 N.M. 400, 188 P.3d 1151 (a court interprets a statute "by first looking to the statute's plain language and giving effect to the plain meaning of the words therein"). The most common definitions of the word "place" relate to physical space. *See* http://www.merriam-webster.com/dictionary/place (defining "place"). In the definition most analogous to the wording of Section 30-9-4(A), the Oxford English Dictionary states:

place, n.

> ...II. Senses relating to space or location.
> ...9.
>
> a. A dwelling, a house; a person's home; ...
> b. A building, establishment, or area devoted to a particular purpose. Usually with qualification indicating the purpose, as place of amusement, place of resort, bathing-place, etc. ...

Petition, Ex. 2(C) at 2-3.

The state argues that the Legislature's 1981 amendment of New Mexico's prostitution statutes evince a legislative intent for the word "place" to be construed broadly enough to encompass a website. Petition at 11-12. However, when Section 31-9-4 was amended to include "places", the internet was not yet available to the public. It was not until the mid-1990's that commercial internet providers began offering internet access to the general public. *See Sprint Intern. Commc'n Corp. v. Dep't of Revenue*, 154 Wash. App. 926, 933, 226 P.3d 253 (Wash. App. Div. 2 2010). Thus, the 1981 Legislature could not have possibly intended to include the internet or its methods of communication within the meaning of "place where prostitution is practiced, encouraged or allowed."[2] Given this historical context, it is clear that the Legislature intended only to include buildings and

[2] In response to Judge Whitaker's ruling in this case, Governor Susana Martinez reportedly called upon the New Mexico Legislature catch up with the 21st century and "start looking at those laws and make them more responsive to the technology today," referring to the relevant statutes as "outdated" and "old." Russell Contreras, Governor Urges New Prostitution Legislation, Abq. Journal at A1 (June 26, 2012).

businesses similar in nature to houses of prostitution, such as motels and strip clubs. *Cf. State v. Hall*, 103 N.M. 207, 704 P.2d 461 (Ct. App. 1985) (defendant convicted of promoting prostitution based on operation of a "swinger's club"). *See also* Petition, Ex. 2 at 6-7 (discussing the history of New Mexico's prostitution statutes).

Not only does the plain language of Section 30-9-4 reject the state's broad construction, basic principles of statutory construction make clear that the word "place" is limited to physical establishments. The first of those principles is *ejusdem generis*, "that where general words follow words of a more specific meaning, 'the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned.'" *State v. Nick R.*, 2009-NMSC-050, ¶ 21, 147 N.M. 182, 218 P.3d 868, *quoting State v. Foulenfont*, 119 N.M. 788, 791, 895 P.2d 1329, 1332 (Ct. App. 1995). In this instance, the general words "a place where prostitution is practiced, encouraged or allowed" follow the more specific "house of prostitution" and must be construed as applying to the same kind or class as that specifically mentioned; namely a building or other physical structure.

A second principle of statutory construction favors a narrow reading of the term "place" in the context of Section 30-9-4(A) & (C). When the

meaning of a statute remains unclear, this Court may "look to other statutes in *pari materia* in order to determine legislative intent." *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010–NMSC–030, ¶ 22, 148 N.M. 426, 237 P.3d 728 (internal quotation marks and citation omitted). This approach "has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the Legislature." *State v. Davis*, 2003–NMSC–022, ¶ 12, 134 N.M. 172, 74 P.3d 1064. Other subsections of 30-9-4 and other statutes within the same chapter, make it abundantly clear that the phrase "a place where prostitution is practiced, encouraged or allowed" applies only to physical places, such as strip clubs, bars and motels.

For example, 30-9-4(B) criminalizes "knowingly entering into any lease or rental agreement for any premises . . . knowing that such premises are intended for use as a *house of prostitution or as a place where prostitution is practiced, encouraged or allowed.*" (Emphasis added.) Premises are clearly physical places—such as apartments, houses or other buildings. *See* Black's Law Dictionary ("premises … 2. The part of a deed that describes the land being conveyed, as well as naming the parties and identifying relevant facts or explaining the reasons for the deed. 3. A house or building, along with its grounds."). When read together, the Legislature clearly intended subsection (A) to reach those individuals who operate

houses of prostitution and like places, and subsection (B) to reach those individuals who lease or rent the places for those operations.

Further, other statutes within the prostitution section of the Criminal Code support a narrow reading. Section 30-9-3 sets forth the petty misdemeanor of patronizing prostitutes. That offense can be committed in one of two ways:

> A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or
>
> B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

NMSA 1978, § 30-9-3 (1989). Subdivision (A) has language identical to that in 30-9-4(A). The crime is committed when a person enters or remains in a designated place with unlawful intent. Subdivision (B), by contrast, is not place specific, but criminalizes the act of hiring or offering to hire a prostitute. In other words, subsection A requires that a person be in a particular place—one in which prostitution is practiced, encouraged or allowed—whereas subsection B criminalizes the hiring of or the offer to hire a prostitute to engage in a sexual act, regardless of where or how the hiring or offer is accomplished. This latter section, not being place specific, can be fairly read to criminalize conduct occurring over the internet or the

telephone, if the elements of the offense otherwise are proven. The former (subsection A) cannot.[3]

Further, Section 30-9-7 describes evidence that is admissible in prostitution-related proceedings. It provides in relevant part:

> In any proceeding under Article 9 or action to abate a public nuisance under Article 8, testimony about the following circumstances is admissible in evidence:
>
> A. the general reputation *of the place*;
>
> B. the reputation of the persons *who reside in or frequent the place*;
>
> *C. the frequency, timing and length of visits by nonresidents; and*
>
> D. prior convictions of the defendant or persons *who reside in or frequent the place* under Sections 9-11, 9-12 and 9-13 of this article or Sections 40-34-1 through 40-34-5 New Mexico Statutes Annotated, 1953 Compilation, or of any other offense of like nature wherever committed.

NMSA 1978, § 30-9-7 (1963) (emphasis added). The use of the phrases "reside in" and "length of visits by nonresidents" indicates the Legislature understood the word "place" to apply strictly to physical spaces where prostitution is practiced.

---

[3] The same is true for section 30-9-4(C), the second provision under which the state seeks an indictment. Section 30-9-4 criminalizes the procurement of prostitutes (1) "for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed" or (2) "for a patron and receiving compensation therefor." § 30-9-4(C), (F). Thus, the statute targets (1) brothels or similar places and (2) pimps (which Black's Law Dictionary defines as "A person who solicits customers for a prostitute, usu. in return for a share of the prostitute's earnings."). The first provision is place specific, while the second is not.

Finally, a nuisance statute included in the prostitution section of the criminal code also makes clear "place" means a physical space:

> A. When the public nuisance sought to be abated under the provisions of Section 30-8-8 NMSA 1978 is a house of prostitution . . . the remedies and presumptions provided in this section apply.
>
> B. For the purposes of this section and Section 30-8-8 NMSA 1978, two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 or 30-9-3 NMSA 1978 *arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution*. . . .
>
> C. If . . . a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:
>
> (1) *direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution* and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and
>
> (2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it . . .

NMSA 1978, § 30-8-8.1 (1989). In sum, reading these related statutes in *pari materia* evinces a legislative intent to reach only buildings, enclosures and similar places, and not to reach virtual spaces like websites and internet message boards.

The state's hypothetical example underscores the unreasonableness of its novel interpretation of the relevant statutes. The state argues that a small shed in which prostitutes and their customers meet to arrange later sexual

encounters or to exchange money for sexual acts would qualify as a "place where prostitution is practiced, encouraged or allowed." Petition at 11. The state asks this Court to imagine a bulletin board inside the shed that is used as a means for prostitutes and their customers to communicate. *Id.* The state then argues that "[i]f the bulletin board were moved to a vacant lot, *this lot* would become a 'place where prostitution is practiced, encouraged, or allowed.'"[4] *Id.* (emphasis added). In other words, the state's hypothetical implicitly recognizes the bulletin board *as a means of communication* and not a "place." It is the physical place where the board is kept that may qualify as the "place where prostitution is practiced, encouraged or allowed."

The state also cites to *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558-59 (7th Cir. 1999) as support for its broad reading of the word "place." The issue in that case was whether an insurance policy that discriminated against people suffering from AIDS violated the Americans with Disabilities Act (ADA). In dicta, the court included a website in its list of "place[s] of public accommodation," within the meaning of 42 U.S.C. § 12182(a). *Doe* is not helpful for several reasons. First, the ADA is a remedial statute enacted to ensure that people suffering from disabilities would not be discriminated

[4] Dr. Flory and Dr. Garcia question whether the communications described in the state's hypothetical meet the definition of "prostitution," *see* NMSA 1978, § 30-9-2, and whether a vacant lot qualfies as a "place," within the meaning of the statutes, but the Court need not resolve these issues.

against. Thus, it should be broadly construed to effectuate its purpose. By contrast, this is a criminal case and an opposite rule of construction applies. "It has long been part of the common law that penal statutes are strictly construed against the state, and that [a]ny doubts about the construction of penal statutes must be resolved in favor of lenity." *State v. Sung*, 2000-NMCA-031, ¶ 15, 128 N.M. 786, 999 P.2d 430; *see also State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994) ("The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute."). Second, even with the ADA's broad remedial purpose, several federal courts have held that a "place of accommodation" means a physical structure or building. *See Ford v. Schering-Plough*, 145 F.3d 601, 612-13 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000); *but see Carparts Dist. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12 (1st Cir. 1994).

III. CONCLUSION

For the foregoing reasons, Real Parties in Interest David C. Flory and F. Chris Garcia respectfully asks the Court to dismiss the state's petition for peremptory writ of superintending control.

Respectfully submitted,

Theresa M. Duncan
Duncan Earnest, LLC
600 Central Ave. SE
Suite 204
Albuquerque, NM 87102
505-852-5196
505-750-9780 (fax)
teri@duncanearnest.com

Attorney for David C. Flory

Robert J. Gorence
Gorence & Oliveros, P.C.
1305 Tijeras Ave. NW
Albuquerque, NM 87102
505-244-0214
505-244-0888 (fax)
gorence@gorcfirm.com

Attorney for F. Chris Garcia

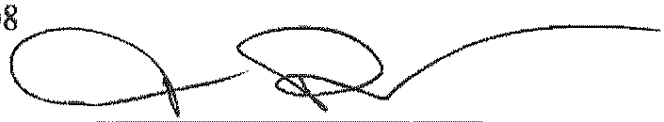
CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September 2012, I mailed and faxed a copy of the foregoing pleading to:

The Honorable Stan Whitaker,
District Court Judge
Second Judicial District Court
400 Lomas NW
Albuquerque, NM 87102
(505) 841-5454 (fax)

Kari Brandenberg,
Second Judicial District Attorney
Michael P. Fricke,
Assistant District Attorney
Second Judicial District Attorney's Office
520 Lomas Blvd NW
Albuquerque, NM 87102-2118
(505) 841-7260 (fax)

Office of the New Mexico Attorney General
PO Drawer 1508
408 Galisteo Street
Santa Fe, NM 87504-1508



Theresa M. Duncan