

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA**

United States of America,

Plaintiff;

v.

Alamance County, North Carolina and Terry
S. Johnson, in his official capacity as Sheriff
of Alamance County, North Carolina;

Defendants.

No. 11-cv-507

AMENDED COMPLAINT

Plaintiff, the United States of America, brings this civil action for a declaratory judgment, submits this Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(1)(B), and alleges as follows:

INTRODUCTION

1. The United States brings this action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, to clarify the obligations imposed by Rule 4.2 of the North Carolina Rules of Professional Conduct (“Rule 4.2”), adopted by this Court pursuant to Local Rule 83.10e.

2. The United States seeks a declaration that Rule 4.2 permits the United States’ attorneys to interview, outside the presence of Defendants’ Counsel:¹ (a) current Alamance County Sherriff’s Office (“ACSO”) non-command staff; and (b) all former

¹ Mr. Clyde B. Albright, Esq., the Alamance County Attorney, has represented Defendants throughout the United States’ investigation.

ACSO employees (collectively, “current and former ACSO personnel”).²

3. The United States Department of Justice (“DOJ”) is currently conducting an investigation of ACSO’s police practices, including whether there is a pattern or practice of biased policing against Latinos in the County. Its investigation is authorized by law under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (“Title VI”), the pattern or practice provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d (“Safe Streets Act”), and the pattern or practice provisions of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (“Section 14141”).

4. Interviews conducted outside the presence of Defendants’ Counsel are an integral part of DOJ’s investigation. Numerous current and former ACSO personnel have refused to cooperate with or expressed fear or concerns to the United States that Defendant Johnson or other County or ACSO officials will retaliate against personnel who cooperate with the United States’ investigation. Interviews outside the presence of Defendants’ Counsel are thus essential to the United States’ ability to collect accurate information about the law enforcement practices employed by ACSO.

5. Defendants have repeatedly and publicly asserted that Rule 4.2 prohibits interviews of current or former ACSO personnel by the United States outside the

² Whether the United States may properly interview ACSO command staff outside the presence of ACSO counsel is not at issue here because the United States has consented to conducting command staff interviews in the presence of Defendants’ Counsel.

presence of Defendants' Counsel. In the past, when Defendants have learned of contacts between DOJ attorneys and current or former ACSO personnel, they have strongly objected; they have excoriated DOJ in the press for allegedly violating their rights under Rule 4.2; and they have threatened to sue DOJ and DOJ attorneys.

6. Rule 4.2 permits DOJ attorneys to interview current and former ACSO personnel outside the presence of Defendants' Counsel during the United States' investigation of Defendants' police practices under Title VI, the Safe Streets Act, and Section 14141. Rule 4.2(a) provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." N.C. R. Prof. C. 4.2(a). Under this provision, interviews with ACSO personnel are appropriate for two independent reasons: (1) under Rule 4.2, the United States is "authorized by law" to conduct investigative interviews prior to commencing an action; and (2) current and former ACSO personnel are not represented parties to whom Rule 4.2 applies.

7. Absent a declaratory judgment, Defendants will continue to chill the speech of current and former ACSO personnel and threaten DOJ attorneys with disciplinary referrals if they continue to conduct interviews outside the presence of Defendants' Counsel.

8. A declaratory judgment by this Court is thus appropriate to clarify the Parties' rights and obligations under Rule 4.2. Such a judgment would forestall and perhaps

avoid broader litigation and would allow the United States to unequivocally conform its investigatory practices to the requirements of Rule 4.2.

The United States, on information and belief, alleges:

DEFENDANTS

9. Defendant Alamance County is a political subdivision of the State of North Carolina. Defendant Alamance County is governed by the Alamance County Board of Commissioners, which controls and administers County government and affairs. N.C. Gen. Stat. Ann. §§ 153A-34, 153A-76. Alamance County programs and activities receive federal financial assistance from DOJ.

10. Defendant Terry S. Johnson is the Sheriff of Alamance County and is responsible for the operation of ACSO, a law enforcement agency in Alamance County that receives federal financial assistance from DOJ, both directly and as a subrecipient of Alamance County and the City of Burlington.

DEFENDANTS' COUNSEL

11. The Alamance County Attorney (“Defendants’ Counsel”) represents Alamance County in the United States’ underlying civil rights investigation of ACSO. Pursuant to North Carolina law, Defendant Alamance County, by and through the Alamance County Board of Commissioners, appoints the Alamance County Attorney. The Alamance County Attorney acts as legal advisor to, and serves at the pleasure of, the Alamance Board of Commissioners. N.C. Gen. Stat. Ann. § 153A-114.

12. Throughout the United States’ civil rights investigation of ACSO, Defendant

Alamance County, by and through the Alamance Board of Commissioners, gave direction to, and received counsel from, the Alamance County Attorney regarding the investigation.

13. During the United States' investigation, the Alamance County Attorney also represented the Alamance County Sheriff, referring to him as "my client," providing him with counsel in regard to the investigation, and writing letters to the United States and others on his behalf.

14. Throughout the United States' investigation of ACSO, until after the United States filed the instant lawsuit, the Alamance County Attorney represented the interests of both Defendants Alamance County Sheriff and Alamance County in the investigation.

15. The statements and actions of Defendants' Counsel throughout the United States' investigation therefore represented the interests of both Defendants.

16. Likewise, as counsel to Defendants, the Alamance County Attorney acted as an agent of Defendants throughout the United States' investigation. Defendants adopted and ratified as their own statements of Defendants' Counsel relating to the investigation.

17. The United States seeks declaratory relief against both Defendant Alamance County and Defendant Johnson because both Defendants, directly and through their counsel, have repeatedly and publicly asserted that Rule 4.2 prohibits interviews of current or former ACSO personnel by the United States outside the presence of

Defendants' Counsel.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1345.

19. The United States is authorized to initiate this action under 28 U.S.C. § 2201(a) and seeks declaratory relief authorized by that section.

20. Venue is proper in the Middle District of North Carolina pursuant to 28 U.S.C. § 1391(b). Defendants reside in the Middle District of North Carolina, and a substantial part of the events or omissions giving rise to this claim occurred there.

FACTS

A. The United States' Investigation of ACSO's Alleged Civil Rights Violations

21. In November 2009, DOJ opened a preliminary inquiry into allegations that ACSO was engaged in a pattern or practice of discriminatory law enforcement activities. Based on this preliminary inquiry, DOJ determined that the matter warranted an investigation. DOJ has discretion to open investigations pursuant to its authority under Title VI, the Safe Streets Act, and Section 14141.

22. On June 2, 2010, the United States notified Defendants in writing that DOJ was initiating a formal investigation of ACSO regarding alleged discrimination pursuant to the above statutes. The United States informed Defendants that the investigation would focus on allegations of discriminatory policing and unconstitutional searches and seizures.

23. Representatives of the United States and Defendants met in Graham, North Carolina on June 15, 2010, to discuss the logistics of the investigation. The United States explained that its investigation would involve extensive document review, interviews with ACSO command staff and line officers, and “ride-alongs” with line officers.

24. To date the United States has not filed a civil action against Defendants based on its investigation.

B. DOJ Attorneys Confirmed the Propriety of ACSO Interviews Using Due Diligence

25. Prior to seeking interviews with ACSO, DOJ attorneys used due diligence to confirm the propriety of interviewing current and former ACSO personnel outside the presence of Defendants’ Counsel pursuant to Rule 4.2.

26. DOJ attorneys independently researched their obligations under Rule 4.2 and consulted with DOJ’s Professional Responsibility Advisory Office (“PRAO”).

27. Pursuant to 28 C.F.R. § 0.129(b), PRAO is tasked with “[a]dvis[ing] Department of Justice attorneys on specific questions involving professional responsibility, including compliance with 28 U.S.C. § 530b . . . , which requires certain federal attorneys to comply with state rules of ethics.” 28 C.F.R. § 0.129(b)(1).

28. Accordingly, PRAO is informed about and familiar with the rules of professional responsibility of every U.S. state and territory, as well as the relevant

interpretations of those rules. *See* 28 C.F.R. § 0.129(b)(2)-(3).

29. The United States has conducted its investigation and seeks relief here consistent with a straightforward interpretation of Rule 4.2 and PRAO's guidance.

C. Defendants Falsely Assert That the United States Cannot Interview Current and Former ACSO Personnel Outside the Presence of Defendants' Counsel

30. Since June 2010, Defendants have consistently sought to prevent the United States from interviewing current or former ACSO personnel outside the presence of Defendants' Counsel, maintaining that any such contacts violate Rule 4.2. The United States has asked to go forward with interviews and proposed specific interview dates on four separate occasions. Defendants have denied access to ACSO personnel each time, either by ignoring requests for interviews, rebuffing the requests outright, or insisting that Rule 4.2 obligates the United States to conduct the interviews in the presence of Defendants' Counsel.

First Denial

31. At the June 15, 2010, meeting, the United States informed Defendants that it planned to conduct two week-long visits to ACSO in July and August 2010 in order to interview ACSO command staff and line officers. On July 9, 2010, the United States confirmed in writing that it had selected the weeks of July 26 and August 30, 2010, to interview ACSO personnel.

32. Defendants initially agreed to these dates telephonically.

33. On July 22, 2010, Defendants abruptly reversed course and insisted that the

United States postpone its visit. Defendants continued to oppose the previously scheduled interviews despite the United States' efforts to negotiate access to ACSO personnel during a July 27, 2010, meeting in Graham, North Carolina and in multiple letters following that meeting.

Second Denial

34. In a letter dated September 17, 2010, the United States reiterated its need to interview ACSO personnel and offered to schedule a telephone conference to arrange such interviews with Defendants' Counsel and Linda Massey, the Chair of the Alamance County Board of Commissioners.

35. Defendants rebuffed the United States' attempt to resolve the dispute over interviewing ACSO personnel, stating in a letter dated September 20, 2010, that Commissioner Massey would not participate in the proposed call.

Third Denial

36. On October 4, 2010, the United States wrote to Defendants and again requested access to interview ACSO personnel.

37. In a letter dated October 5, 2010, Defendants asserted that, pursuant to Rule 4.2, the United States was required "to coordinate with Counsel [for Defendants] prior to contacting current or former employees" of ACSO, and stated that "further contact with ACSO employees (current or former) without working through [Defendants' Counsel] would constitute serious misconduct."

38. In a letter dated October 6, 2010, Defendants denied the interview request,

stating that they would not agree to interviews outside the presence of Defendants' Counsel.

Fourth Denial

39. The United States renewed its request to interview ACSO personnel in a letter dated December 29, 2010.

40. Defendants did not respond to the United States' request that they select interview dates.

D. Defendants' Counsel Re-asserts That Rule 4.2 Bars the United States From Conducting Interviews Outside His Presence

41. Defendants' Counsel re-affirmed his unwillingness to permit interviews outside his presence during a March 23, 2011, meeting with DOJ attorneys in Alamance County. There, DOJ attorneys met with Defendants' Counsel and ACSO Chief Deputy Tim Britt to discuss outstanding access issues relating to the United States' investigation. During the meeting, the DOJ attorneys repeated their view that Rule 4.2 does not apply to investigative interviews prior to the commencement of enforcement proceedings. Defendants' Counsel rejected this interpretation and unambiguously re-stated his conviction that Rule 4.2 obligates DOJ attorneys to conduct all interviews of ACSO personnel, past and present, in his presence.

E. Defendants Have Publicly Asserted That the United States Is Prohibited From Interviewing ACSO Personnel Outside the Presence of Defendants' Counsel and That ACSO Personnel Should Not Participate in Such Interviews

42. In press interviews and public statements, Defendants and Defendants'

Counsel have repeatedly stated that ethical rules prohibit the United States from speaking to ACSO personnel outside the presence of Defendants' Counsel. First, in a letter dated July 26, 2010, Defendants' Counsel directed Defendant Johnson to "advise all Sheriff Department personnel that if contacted by the DOJ attorneys they should state that all communications must be made in the presence of and by agreement with the County Attorney [Defendants' Counsel]."

43. In this same letter, Defendants' Counsel asserted that, in contacting an ACSO deputy, the United States had acted "in defiance of [his] instructions to the contrary and in violation of the ethical rules governing attorney conduct."

44. Defendants distributed this letter to all ACSO personnel, and a local newspaper reprinted a portion of it. Tomas Murawski, *County Attorney: No Deputy Should Talk to Justice Dept. Lawyers Without Him Present*, The Alamance News, July 29, 2010, at 1A.

45. Defendants' Counsel then unequivocally informed the local press that the DOJ attorneys had committed ethical violations by contacting ACSO personnel. The Burlington Times-News reported that "Justice attorneys violated ethics rules when they tried to contact sheriff's deputy James Conklin directly. The contact, which came against Albright's [Defendants' Counsel's] instruction to the contrary, was a violation because the attorneys are not licensed to practice law in North Carolina, Albright said." Robert Boyer, *County Attorney, Justice Officials at Odds Over Sheriff's Investigation*, The Burlington Times-News, Aug. 5, 2010, available at

www.thetimesnews.com/news/county-35902-justice-attorney.html.

46. Likewise, The Burlington Times-News reported that “[l]ike other attorneys, Justice lawyers must follow ethical rules that prohibit them from speaking to those who are represented by another attorney, Albright [Defendants’ Counsel] said.”

Robert Boyer, *County Urged To Cooperate with Probe*, The Burlington Times-News, Aug. 17, 2010, available at www.thetimesnews.com/news/county-36154-urged-alamance.html.

47. In addition, the local press has repeated Defendants’ Counsel’s claim that he represents all ACSO employees. For example, a September 7, 2010, Burlington Times-News article quoted Defendants’ Counsel’s statement that he represents ACSO deputies: “I have a duty to represent the Sheriff and deputies [t]he deputies are also my clients.” Robert Boyer, *County Attorney May Be Violating Federal Law, Justice Officials Say*, The Burlington Times-News, Sept. 7, 2010, available at <http://www.thetimesnews.com/news/attorney-36733-justice-county.html>.

48. Most recently, Defendants’ Counsel indicated the County is considering “a potential lawsuit” stemming from “his grievances with the Justice Department” over its investigation. *In Twist, County May Sue DOJ Over Civil Rights*, The Alamance News, Apr. 14, 2011, at 1A.

49. These public statements breed confusion among ACSO employees about the propriety of participating in interviews outside the presence of Defendants’ Counsel. Additionally, these statements reinforce the doubts and fears some current and former

ACSO personnel have about whether participating in investigatory interviews can subject them to retaliation by the Sheriff and/or ACSO.

F. Interviews Outside the Presence of Defendants' Counsel Are Essential to the United States' Investigation

50. Interviews conducted outside the presence of Defendants' Counsel are essential to the United States' ability to gather accurate information about allegations of discriminatory policing by ACSO. Several ACSO officers have indicated that they would like to provide information to the United States, but have declined to be interviewed out of fear that the Sheriff and/or ACSO or its agents will fire them or otherwise retaliate against them. Other current and former officers have agreed to speak with the United States only after taking significant steps to ensure their confidentiality:

- a. A current or former ACSO officer agreed to speak to DOJ attorneys only after making special arrangements to avoid detection by Defendants. The interview occurred late at night, and a third party dropped the officer off at the site of the interview so that ACSO would not observe the officer's car during the meeting.
- b. A second current or former ACSO officer expressed concerns that Defendants were conducting surveillance to learn the identity of the individuals cooperating with the United States' investigation. To evade this surveillance, the officer requested that his/her interview take place at

night in a dimly lit parking lot.

- c. A third current or former officer provided information to the United States, but refused to provide his/her name, rank, or any other identifying information.
- d. A fourth current or former officer stated that he/she was interested in speaking with the United States, but could not do so because he/she feared that the Sheriff would cause him/her to lose his/her job.
- e. A fifth current or former officer cancelled a scheduled in-person interview out of fear that Defendants would retaliate against his/her family member.
- f. A sixth current or former officer who agreed to meet with the United States explained that “people [at ACSO] are terrified because they think they could be fired and [the Sheriff] has fired folks.”

CLAIM FOR RELIEF:

NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 4.2 PERMITS THE UNITED STATES TO INTERVIEW ACSO PERSONNEL OUTSIDE THE PRESENCE OF DEFENDANTS’ COUNSEL

51. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1-50 above.

52. Defendants have repeatedly asserted that Rule 4.2 prohibits the United States from interviewing any current or former ACSO personnel outside the presence of Defendants’ Counsel.

53. The United States maintains that Rule 4.2’s “authorized by law” exception

permits such interviews.

54. Further, the United States maintains that current and former ACSO personnel are not represented parties within the meaning of Rule 4.2.

55. Defendants have repeatedly and publicly invoked the rules governing attorney conduct, including Rule 4.2, to justify their denial of DOJ access to ACSO personnel, and to discourage both current and former ACSO personnel from engaging in communications or interviews outside the presence of Defendants' Counsel, and will continue to do so absent the requested relief.

PRAYER FOR RELIEF

56. The United States is authorized by law to investigate ACSO's police practices under Title VI, the Safe Streets Act, and Section 14141, and Defendants' Counsel does not represent current non-command staff or former ACSO personnel. For these two reasons, Rule 4.2 poses no barrier to the interviews the United States is seeking to conduct outside the presence of Defendants' Counsel.

WHEREFORE, the United States prays that the Court:

- a. Declare that North Carolina Rule of Professional Conduct 4.2 does not prohibit the United States from conducting interviews with current and former ACSO personnel outside the presence of Defendants' Counsel; and
- b. Order such other relief as the interests of justice may require.

DATED: July 14, 2011

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CERTIFICATE OF SERVICE

I certify that the foregoing Amended Complaint was served through the electronic filing service on July 14, 2011, to the following individuals:

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