

WELLBORN V. NARANJO

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**CLINT WELLBORN, District Attorney
for the Seventh Judicial District,
Petitioner-Appellee,**

v.

**THE HONORABLE JIM NARANJO,
Magistrate Judge for Socorro County,
Respondent,**

**IN THE MATTER OF STATE V. ROBERT
TORRES, NO. M-52-FR-2010-00130 and
NO. M-52-FR-2010-00054,
Real Party in Interest/Defendant-Appellant.**

NO. 30,689

COURT OF APPEALS OF NEW MEXICO

December 16, 2010

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY, Kevin Sweazea,
District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Patrick J. Martinez, Albuquerque, NM, for Appellant

JUDGES

CELIA FOY CASTILLO, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, LINDA
M. VANZI, Judge

AUTHOR: CELIA FOY CASTILLO

MEMORANDUM OPINION

CASTILLO, Judge.

Defendant appeals from the district court's order granting District Attorney's (the State) petition for writ of prohibition or superintending control. [RP 20] Our notice proposed to dismiss for lack of a final order. Defendant filed a timely memorandum in opposition. Unpersuaded by Defendant's arguments, we dismiss.

The order from which Defendant appeals quashes the magistrate court's orders disqualifying the Seventh Judicial District Attorney's Office (DA's office) from prosecuting Defendant in two separate cases. See M-52-FR-2010-00130 and M-52-FR-2010-00054. [RP 20] The district court's order also remands both matters to the magistrate court for further proceedings. [RP 21] Because further matters remain to be adjudicated, we dismiss for lack of a final order. See *generally State v. Montoya*, 2005-NMCA-005, ¶¶ 4-5, 136 N.M. 674, 104 P.3d 540 (discussing that when the district court enters an order of remand to the magistrate court that requires further substantive determinations, the order is not final for purposes of appeal); *Bd. of Trustees of Vill. of Los Ranchos de Albuquerque v. Sanchez*, 2004-NMCA-128, ¶¶ 1, 14, 136 N.M. 528, 101 P.3d 339 (holding that a peremptory writ of mandamus is not a final order for purposes of appeal when an issue of damages in connection with the activity covered by the writ has not been resolved).

Moreover, as noted, in both cases the district court has remanded for preliminary hearings. It is entirely possible that Defendant may not be bound over to the district court or, if he is, Defendant may still be acquitted in the district court. In either event, Defendant's issues would be rendered moot. See *State v. Wyrostek*, 117 N.M. 514, 523, 873 P.2d 260, 269 (1994) (recognizing that this Court will not issue advisory opinions).

While Defendant would prefer to be able to challenge the district court's ruling before being subjected to a preliminary hearing and the possibility of being bound over to district court [MIO 2], the lack of finality and possibility for mootness preclude us from addressing the merits. Because Defendant's arguments may be considered in a direct appeal in the event he is ultimately convicted, we decline to address them now. See *generally State v. Armijo*, 118 N.M. 802, 806, 887 P.2d 1269, 1273 (Ct. App. 1994) (recognizing that a defendant may raise a disqualification issue on direct appeal following conviction, whereas the state may appeal the disqualification of a prosecutor pursuant to the collateral order doctrine due to double jeopardy implications). Similarly, we acknowledge Defendant's argument that the district court's order was procedurally defective because it was entered before he was given the opportunity to file an answer to the State's petition for writ of prohibition or superintending control. [MIO 2] This too, however, is a matter related to the underlying merits of Defendant's appeal that we are precluded from addressing until finality requirements have been met. See, e.g., *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 238, 824 P.2d 1033, 1040 (1992) (providing that a judgment is not final if a question remaining to be decided thereafter could alter, revise, or moot the decisions embodied therein), *limited on other grounds by Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993).

Based on the foregoing discussion, we dismiss for lack of a final order.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge