STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,

No. D-101-CR-2024-0013

vs.

Judge Mary Marlowe Sommer

ALEXANDER RAE BALDWIN,
Defendant.

STATE'S *EXPEDITED* RESPONSE TO THE DEFENDANT'S MOTION TO EXCLUDE PREVIOUSLY DISCLOSED WITNESSES

COMES NOW the State of New Mexico by its Special Prosecutors Kari T. Morrissey and Erlinda O. Johnson, and hereby respectfully submits the following response in opposition to the defendant's motion to exclude previously disclosed witnesses and in support thereof, the State submits the following.

INTRODUCTION

On February 6, 2024, the State filed its witness list naming its fact witnesses as well as its proposed expert witnesses. On March 1, 2024, the defense filed its witness list naming David Halls as their only witness. On April 19, 2024, the defense filed its first amended witness list naming an additional 18 witnesses. On May 6, 2024, the defense filed a second amended witness list naming an additional seven witnesses, for a total of 26 witnesses. On that same day, the state filed its second addendum to the State's third amended witness list. On that addendum, the State indicated that it was also listing on its witness list, "[a]ny witnesses disclosed by the defense, called as a witness by the defense, or listed on the defense witness list."

The deadline for filing pretrial motions was also May 6, 2024. In an effort to preserve its right to challenge the defendant's May 6, 2024, disclosure of nine additional witnesses, the State filed a

motion to exclude those witnesses. However, the parties continued interviewing witnesses as the pretrial interview deadline is June 5, 2024. The State continued working through the weekend of June 1-2, 2024, investigating the statements of the defense witnesses and concluded that there was no prejudice to the State from the defendant's May 6, 2024, disclosure of the nine additional witnesses. Most of the witnesses were interviewed and the State had been working overtime investigating their statements. Therefore, even though the State initially filed a motion to exclude the witnesses on the motions' deadline, upon closer review and investigation, the State concluded there was no prejudice from the defendant's disclosure.

Meanwhile, realizing that several of its witnesses were actually damaging to the defendant, the defense filed a notice agreeing that some of its witnesses should be excluded. The defendant's move was not based on a desire to "streamline issues" or "a good faith effort to reduce the number of its witnesses by a significant margin" and as a result "consented to the relief sought by the State as to five of them." The defendant's move to withdraw some of its witnesses was based on the fact that their witnesses actually provided information during pretrial interviews that supports the State's theory of defendant's recklessness. In fact, during his pretrial interview, Zachary Sneesby told the parties that he positively saw the defendant Alec Baldwin pull the trigger when he shot Halyna Hutchins.

Over the weekend, the State continued to work and determined to withdraw its opposition to the defense witnesses. The defense now moves to exclude the very witnesses it listed on its witness list and whom the state also notified, on May 6, 2024, it could call at trial. The defendant's motion is frivolous and must be denied. The witnesses have been interviewed and the State timely notified the

defense it reserved the right to call any witnesses disclosed on the defendant's witness lists. The defense has suffered no prejudice, and their motion must be denied.

ARGUMENT

I. Exclusion of Witnesses is not Justified

"Exclusion of witnesses requires an intentional violation of a court order, prejudice to the opposing party, and consideration of less severe sanctions[.]" *State v. Harper,* 2011-NMSC-044, ¶ 2, 150 N.M. 745, 266 P.3d 25. In *Harper*, the Court pointed out that witness exclusion and dismissal are extreme sanctions, to be used only in exceptional cases. *Id.* ¶¶ 16, 21. The Supreme Court later sought to "clarify the circumstances under which a court may permissibly exclude a witness as a discovery sanction." *State v. Le Mier*, 2017-NMSC-017, ¶ 1, 394 P.3d 959.

When considering sanctions, prejudice to the opposing party is a central consideration. *See State v. Harper,* 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 ("the mere showing of a violation of a discovery order, without a showing of prejudice, is not grounds for sanctioning a party"). The Court should consider prejudice as it decides what type of sanction to impose. In general, the "'trial court...should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible.'" *Id. (quoting* LaFave, §20.6(b) at 500-01) (internal quotation marks and citation omitted). "Courts should apply the extreme sanction of exclusion of a party's evidence sparingly. The decision to exclude evidence calls on judicial discretion to weigh all the circumstances, including willfulness in violating the discovery rule, the resulting prejudice to the opposing party, and the materiality of the precluded testimony." *State v. Guerra,* 2012-NMSC-014, ¶ 33, 278 P.3d 1031.

"[E]ven when a party has acted with a high degree of culpability, the severe sanctions of dismissal or the exclusion of key witnesses are only proper where the opposing party suffered tangible prejudice." *Harper,* 2011-NMSC-044, ¶ 19. "When exercising their discretionary power, our courts must be ever mindful of the fact that witness exclusion is a severe sanction and one that should be utilized as a sanction of last resort." *State v. Le Mier,* 2017-NMSC- 017, ¶ 21. The *Harper* court discussed in more detail the need to show prejudice:

> The requirement that any serious sanction against the State be conditioned on a finding of prejudice is well established in our case law...[P]rejudice must be more than speculative. Therefore, when discovery has been produced late, prejudice does not accrue unless the evidence is material, and the disclosure is so late that it undermines the defense's preparation for trial. The potential for prejudice is manifest when, for example, material evidence is withheld altogether or where the State withholds evidence until the eleventh hour and then springs it on the defendant. However, when discovery is merely delayed in reaching the defendant, or the defendant has knowledge of the contents of the unproduced evidence, determination of prejudice is more elusive...[L]ike outright dismissal of a case, the exclusion of witnesses should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party.

Id. ¶¶ 19-21 (citations omitted).

The Supreme Court recently clarified its view of *Harper.* The *Harper* Court did not establish a rigid and mechanical analytic framework. Nor did *Harper* embrace standards so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority. Such a framework and such limitations would be unworkable in light of the fact that our courts' authority to exclude witnesses is discretionary, and courts must be able to avail themselves of, and impose, meaningful sanctions where discovery orders are not obeyed, and a *party's conduct* injects

needless delay into the proceedings. *State v. Le Mier*, 2017-NMSC-017, ¶ 16 (citations omitted, emphasis added). As emphasized by *LaMier,* sanctions should be used to punish culpable conduct. There is no evidence that the State ignored the Court's scheduling order.

By requesting the extreme sanction of exclusion of witnesses, the defendant tempts this Court to abuse its discretion. *Harper,* §27 ("failure to impose a less severe sanction, together with the lack of any proof of prejudice to Harper or an intentional refusal to obey the district court's discovery directive, constituted an abuse of discretion"). The Defendant in his motion only claims prejudice but makes no effort to demonstrate how he has been prejudiced by the state specifically listing the witnesses the state had notified the defense, on May 6, 2024, it could call at trial. The fact that the pretrial interview deadline expires June 5, 2024, and the defense canceled pretrial interviews of three witnesses which had been scheduled for June 3 and 5, 2024, does not constitute prejudice as the State has offered and will agree to an extension of the pretrial interview deadline to accommodate rescheduling the three canceled pretrial interviews.[1]

More importantly, the two witnesses listed by the state on its third addendum to the State's witness list are defense witnesses who have already been interviewed by the parties. Notably, Ms. Gutierrez has already been listed on several of the State's witness lists. Messrs. Sneesby and Gandy were listed on the defendant's witness list and have already been interviewed by the parties. Other than being concerned that the truth will actually be

[1] It bears noting that the defense has refused to accept the State's offer to extend the pretrial interview deadline. That alone signals their interest is solely in exclusion of witnesses they view as damaging to the defendant.

revealed by his own witnesses, the defendant has not even attempted to demonstrate how he is prejudiced by the state's notice that it will call some of the witnesses the defendant himself listed on his witness list but later withdrew after the defense learned how damaging the witnesses' testimony would be to the defendant.

Exclusion is not appropriate nor warranted. The fact that the State withdrew its previous motion to exclude is of no moment. The fact remains that there is no evidence the State intentionally violated the Court's rules and more importantly, the defense has not been prejudiced---a prerequisite that must be established before exclusion is justified. The defendant complains that it canceled the pretrial interviews of three of the five witnesses whom the defense withdrew. However, the State has offered to extend the deadline for conducting pretrial interviews so that the defense can reschedule those witnesses for pretrial interviews. The State submits that is the appropriate remedy and not exclusion. Accordingly, the State respectfully requests the Court reject the defendant's request to exclude the witnesses the defendant himself listed but later withdrew simply because they will testify to damaging information against the defendant.

II. Judicial Estoppel does not Apply

The important interest in the enforcement of criminal law and the "'[t]he public interest in the accuracy and justice of criminal results,' are not present in civil litigation and outweigh the concern in civil cases for judicial economy." *See State v. Arevalo*, 2002-NMCA-062, ¶ 12, 47 P.3d 866 (*quoting Standefer v. United States*, 447 U.S. 10, 24-25 (1980)). In *Arevalo,* the Court of Appeals rejected the application of nonmutual collateral estoppel raised by the defendant in a criminal case in order to prevent the state from prosecuting him after his

co-defendant was prosecuted based on the same evidence, facts, charges and found not guilty. 2002-NMCA-062, ¶¶4-5. The Court of Appeals reversed the district court's dismissal based on nonmutual collateral estoppel. *Id.* at ¶ 20, 22. It is evident from the opinion reversing the district court that New Mexico courts are reluctant to apply legal doctrines, like estoppel, from civil law to criminal law. *See id.* at ¶ 20.

In this case, the defendant is asking the court to apply "judicial estoppel" found applicable in civil cases, to the State's discretionary decision to withdraw a motion it had previously filed. The State was unable to find any criminal cases in which the doctrine of judicial estoppel was applied in a criminal case and the defendant cites to none. Accordingly, based on the Court of Appeals rejection of the application of civil nonmutual estoppel to a criminal case, it is logical to conclude that our appellate courts would also reject the application of judicial estoppel to this criminal case. Therefore, the State respectfully requests this Court deny defendant's invitation to judicially estopp the state from opposing the exclusion of the defendant's witnesses previously disclosed on May 6, 2024.

Alternatively, if the Court were to consider the doctrine of judicial estoppel, its applicability to this case is not warranted. "Judicial estoppel is a doctrine that prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Keith v. Manor Care, Inc.*, 2009-NMCA-119, ¶ 36, 218 P.3d 1257 (quoting *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, ¶ 20, 943 P.2d 136).

To prevail under the Doctrine of Judicial Estoppel: First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation.

Second, that first position must be necessarily inconsistent with the position the party takes later in the proceedings. Finally, judicial estoppel will be applicable when the party's change of position prejudices a party who had acquiesced in the former position. *See Santa Fe Pacific Trust, Inc. v. City of Albuquerque,* 2012-NMSC-028, ¶ 32, 285 P.3d 595.

The record in this case is crystal clear there were never any hearings or other judicial proceedings in which the state's initial motion to exclude certain defense witnesses was adjudicated by the court. The defendant's fortuitous acquiescence to the exclusion of some of the defense witnesses it listed but who turned out to offer inculpatory information against the defendant does not qualify to meet the first element requiring success in the position previously assumed for judicial estoppel to apply.

It is clear from reading the cases in New Mexico that success in a prior legal proceeding means persuading a judge, hearing officer; tribunal or other arbiter and obtaining a favorable order based on the relevant argument is a crucial element to judicial estoppel. *See O'Brien v. Behles* 2020-NMCA-032, 464 P.3d 1097; *Gabriel Vigil v. New Mexico Taxation and Revenue Department* 2022-NMCA-032, ¶ 29, 514 P.3d 15. In the context of judicial estoppel, to successfully assume a position means to successfully argue that position. *Wooten v. Vincent,* NMCA 32,290 (7-14-2014) mem. Op. ¶ 14 (non-precedential) 2014 WL 4293204 (successfully assumed means ultimately convinced the Court).

Here, the Court did not issue an order granting the state's motion to exclude. The defendant's partial acquiescence to the motion does not constitute success in the position by the state. Accordingly, the defendant has failed to satisfy the first requisite element for judicial estoppel to apply.

Even if the Court were to find the first element is satisfied, the defendant fails on the most important element requiring a showing of prejudice. The defendant has not shown, because he simply cannot, that the state's withdrawal of its motion to exclude certain defense witnesses has prejudiced the defendant. First, the witnesses the state intends to call at trial and for whom it has withdrawn opposition are defense witnesses who have already been interviewed by the parties. The defendant claims it is prejudiced because the pretrial interview deadline is June 5, 2024, and the defense cancelled other pretrial interviews of other defense witnesses as to whom the state initially objected, thereby leaving the defendant without time to reschedule the three witnesses whose pretrial interviews the defense cancelled. To cure this scheduling issue, the State agrees to extend the pretrial motions deadline to allow defendant to reschedule the three pretrial interviews it canceled.

The reality is that the defendant has suffered no prejudice from the state's withdrawal of its motion to exclude and by the state's notification that it intends to call two previously disclosed defense witnesses. Indeed, in its May 6, 2024, witness list the state notified the defense that it would also call any defense witness listed on any of the defendant's witness lists. It appears the defendant realized over the weekend of June 1-2, 2024, that some of the listed defense witnesses offered damaging evidence against the defendant which he now seeks to hide from the jury. Defendant's motion fails on the merits and the law. Accordingly, it must be denied.

Lastly, the state submits that it has the discretion to withdraw its motion. The state simply withdrew its motion to exclude witnesses, conceding that after pretrial interviews and further investigation, there was no prejudice from the defendant's May 6, 2024, disclosure of defense

witnesses. Indeed, most have been interviewed and the state has been able to follow up on those statements. A prosecutor's pre-trial decisions enjoy a strong presumption of regularity because of the broad discretion given to prosecutors in initiating and conducting criminal prosecutions, *see generally United States v. Armstrong*, 517 U.S. 456, 464 (1996), and absent bad faith will not be disturbed. *See Blackledge v. Perry*, 417 U.S 21, 28-29 (1974). Therefore, absent a showing of bad faith, the state's withdrawal of its motion does not warrant review by the Court. Accordingly, the defendant's motion must be denied, without a hearing.

Wherefore, for the foregoing reasons, the State respectfully requests this Court deny the defendant's motion to exclude witnesses.

Respectfully Submitted,

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I hereby certify that a true and accurate copy of the foregoing was provided to

counsel for the defendant via e-mail
this 4th day of June 2024.

/s/ *Erlinda O. Johnson*
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