

**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 RESPONSE TO MOTION TO QUASH SUBPOENA
TO WITNESS MELINDA ZAMORA AND REQUEST FOR EXPEDITED RULING**

COMES NOW the State of New Mexico by and through Special Prosecutors Kari T. Morrisey and Erlinda O. Johnson, and hereby respectfully submits its response in opposition to the motion to quash subpoena to witness Melinda Zamora filed by counsel Jason Bowles and the respectfully requests an expedited ruling by this Honorable Court as the deadline for pretrial interviews is June 5, 2024. In support of its response in opposition, the State submits the following.

INTRODUCTION

On January 31, 2023, Defendant Hannah Gutierrez Reed was charged by way of criminal information with involuntary manslaughter in connection with her part in the October 21, 2021, killing of Halyna Hutchins. On June 22, 2023, the State filed an amended criminal information. On August 4, 2023, Defendant Gutierrez filed a waiver of preliminary hearing. On February 21, 2024, Ms. Gutierrez proceeded to trial. On March 8, 2024, she was found guilty of involuntary manslaughter.

During the investigation and preparation for trial, the state obtained a telephone download of Ms. Gutierrez's telephone. The download contained text messages between Mr.

Bowles, Thell Reed and Hannah Gutierrez wherein they discussed a December 1, 2021, telephone call Defendant Alexander Baldwin placed to Mr. Bowles' office, without the presence of counsel. During the call Mr. Baldwin spoke with Melinda Zamora, Mr. Bowles' assistant. According to a summary of the call which Mr. Bowles provided to Hannah Gutierrez and Thell Reed on December 1, 2021, Mr. Baldwin had stated that he was anxious to speak to Mr. Bowles. Mr. Baldwin stated that he just gave an interview (presumably referring to the interview with George Stephanopoulos) to talk about "what he has been through." Mr. Baldwin continued that he wanted Mr. Bowles to know that he wants to "get to the bottom of this," and explained that he had no problem with Hannah and "then this happened." Mr. Baldwin explained that he didn't want to get "into much detail on the phone" but that this "doesn't make sense to him, he worked with her (Ms. Gutierrez) no problem, not one problem and she was great." Mr. Baldwin continued that "the days he was there, worked with her everything was fine, then this happens." Mr. Baldwin went on to explain to Ms. Zamora that he "doesn't understand what is going on," "he is so sickened not getting to the truth," "the police have right intentions, but he gave interview that he can't wait to solve the case." Mr. Baldwin expressed concerns about damages to his reputation and that "groves of people think that he is responsible -- that he killed her -- he had to say something with the interview." Mr. Baldwin explained that "he is becoming more worried and would like to speak to you (Mr. Bowles) about this."

Pursuant to a subpoena duces tecum and for statement issued to Melinda Zamora, she is required to provide a pretrial interview on May 9, 2024, and to provide the documents set forth on page one of Mr. Bowles' motion to quash. Pursuant to a subpoena duces tecum, the State requested documents and a pretrial interview relating to Mr. Baldwin's statements to Ms.

Zamora as that information is admissible against Mr. Baldwin pursuant to Rule 11-801(D)(2) NMRA, as admissions by a party opponent or an agent of the defendant.

On April 24, 2024, the State issued a subpoena to Ms. Zamora to provide documents and a pretrial interview. On May 6, 2024, Mr. Bowles filed a motion to quash the subpoena issued to Ms. Zamora setting forth the same arguments set forth in Mr. Bowles' Motions to Quash a subpoena duces tecum for communications regarding the Baldwin telephone call to the Bowles law firm. In his May 6th motion to quash Ms. Zamora's subpoena, Mr. Bowles argues that the information possessed by Ms. Zamora is covered by the attorney-client privilege and the common interest doctrine or a joint defense agreement as it is more commonly known. Since neither privilege applies, this Court must deny the motion to quash subpoena and order Ms. Zamora to provide a pretrial interview. Additionally, the State respectfully requests an expedited ruling by this Court as the deadline for pretrial interviews is June 5, 2024.

ARGUMENT

The attorney-client privilege has four elements: "(1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client." *Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215. The party claiming the privilege has the burden to establish "a communication is protected as an exception to the ordinary rule" that "the public has a right to every man's evidence." *Id.* ¶ 13 (internal quotation marks and citation omitted).

In *Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 13, 143 N.M. 215, 221, the Court noted,

A client may claim attorney-client privilege to refuse to disclose confidential communications between certain persons if the communications were made for the

purpose of acquiring legal advice for the client. Rule 11–503(B); *see State ex rel. State Highway Comm'n v. Steinkraus*, 76 N.M. 617, 620, 417 P.2d 431, 432 (1966) (stating that the attorney-client privilege protects communications, not facts).

Id. “[A] party cannot simply make a blanket claim of privilege; rather, the party must claim and establish the attorney-client privilege on a document-by-document basis.” *Hugley v. Art Institute of Chicago*, 981 F.Supp. 1123, 1128 (N.D. Ill. 1997); *see also Hartman v. Texaco, Inc.*, 1997-NMCA-032, ¶ 21, 123 N.M. 220, 225-26 (“The party asserting work product immunity under NMRA 1-026(B)(4) bears the burden of establishing for each document that the rules applies.”).

As it relates to the subpoena issued to Ms. Zamora by the State, the information subpoenaed does not relate to privileged attorney-client communications or information. Instead, the information relates to statements and or information provided by the defendant herein (Alexander Baldwin) or his representatives, to Ms. Zamora. On December 1, 2021, Mr. Baldwin, acting on his own, placed a call to Mr. Bowles’ office, during which he made several statements to Ms. Zamora. According to a text message between Mr. Bowles, Ms. Gutierrez and Mr. Reed, during the Baldwin telephone call, Mr. Baldwin essentially stated that he would issue a public statement relating to the events leading up to the killing of Ms. Hutchins on October 21, 2021, stating that he (Mr. Baldwin) did not think Ms. Gutierrez did anything wrong and that he had no issues with her. In exchange, Mr. Baldwin asked that Ms. Gutierrez and her team not “slam” him in the press as it relates to the statements he made that he did not pull the trigger.

The State’s subpoena does not seek any communications between Ms. Zamora and Mr. Bowles as it relates to Ms. Gutierrez’s defense. However, communications between Ms. Zamora or Mr. Bowles and Mr. Baldwin and his legal representatives are not protected under the attorney client privilege or the common interest doctrine or joint defense agreement. Indeed, the State has a good faith basis to believe that on December 1, 2021, Mr. Baldwin had not entered into a joint

defense agreement or common interest agreement with Ms. Gutierrez and her counsel. Even if Mr. Baldwin had an agreement at the time, the common interest doctrine does not apply to the statements made by him to Mr. Bowles or his staff.

The common-interest rule protects the confidentiality of communications passing from one party to the attorney for another party, under the attorney- client privilege, where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. Rule 11-503(B) NMRA (2013). While it is true that “[t]he joint defense privilege protects communications between an individual and an attorney for another when the communications are ‘part of an ongoing and joint effort to set up a common defense strategy,’” *United States v. Bay State Ambul.*, 874 F.2d 20, 28 (1st Cir. 1989)(citation omitted), the burden is on the person claiming the privilege to demonstrate the existence of a joint defense agreement that would preclude admission of the evidence. *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999). “Privileges should be narrowly construed, and expansions cautiously extended.” *Id.* at 100.

In New Mexico, courts have recognized the joint defense privilege as the “common interest” doctrine. *See Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, 143 N.M. 215. However, the party claiming the privilege must demonstrate its applicability. *Abq. Journal v. Bd. Of Educ. Of Albuquerque Pub. Sch.*, 2019-NMCA-012, 19-21, 436 P.3d 1. A joint defense agreement is not established where defendants merely contemplate a joint defense agreement and attend a meeting together. *See e.g., Ludwig v. Pilkington No. Am., Inc.*, No. 03 C 1086, 2004 WL 1898238, at * 4 (N.D. Ill. Aug. 13, 2004). When co-defendants enter into a joint defense agreement, by contrast, each defendant retains his own attorney. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). Once a joint defense agreement has been entered,

communications made during joint defense strategy sessions are privileged. *See Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir.1977); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). In *Schwimmer*, 892 F.2d 237 (2d Cir.1989), the Court stated that a claim resting on the common interest rule requires a showing that “the communication in question was given in confidence and that the client reasonably understood it to be so given.” 892 F.2d at 244. It is important to note, however, that “a joint defense agreement does not create an attorney-client relationship between an attorney and the co-defendant.” *United States v. Exec. Recycling, Inc.*, 908 F. Supp. 2d 1156, 1159–60 (D. Colo. 2012).

In this case, the claim that Mr. Baldwin’s statements to Ms. Zamora are privileged pursuant to a common interest or joint defense agreement is premised on a legal fallacy. Absent a showing that Ms. Gutierrez, her counsel, Mr. Baldwin, and his counsel had entered into a joint defense agreement, at the time, and that the statements by Mr. Baldwin were given in confidence and during a joint defense strategy session, Mr. Baldwin’s statements and information to Ms. Zamora are not privileged under the common interest doctrine or joint defense agreement and therefore, must be provided to the state pursuant to the validly issued subpoena. Accordingly, there is no legal authority justifying the quashing of the subpoena issued to Ms. Zamora.

Wherefore, for the foregoing reasons, the State respectfully requests this Honorable Court deny Mr. Bowles’ motion to quash subpoena for Ms. Zamora and issue an expedited ruling ordering the production of the subpoenaed information and Ms. Zamora’s pretrial interview.

Respectfully Submitted,

/s/ Kari T. Morrissey

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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 9th day of May 2024.

/s/ Erlinda O. Johnson

Erlinda O. Johnson