

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

STATE OF NEW MEXICO,

Plaintiff,

v.

No. D-101-CR-2024-00013
Judge Mary Marlowe Sommer

ALEXANDER RAE BALDWIN,

Defendant.

**DEFENDANT ALEC BALDWIN'S EXPEDITED MOTION FOR
ORDER EXCLUDING WITNESSES**

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Defendant Alexander R. Baldwin III, by and through undersigned counsel, respectfully moves this Court for an order excluding Defense witnesses as identified in Defendant's Notice of Withdrawal of Defense Witnesses (filed June 2, 2024). As grounds for his Motion, Defendant states:

I. Factual & Procedural Background

1. On February 26, 2024, the Court filed the Scheduling Order in this matter, instructing parties that final trial witness lists must be filed by May 6, 2024, and no additional witnesses could be added after that deadline absent the Court finding good cause.

2. In accordance with Court orders, on May 6, 2024, Defendant filed his witness list. The State also filed its witness list.

3. On May 6, 2024, the State filed a motion seeking to exclude nine witnesses ("State's Motion") from the Defendant's witness list.

4. On May 21, 2024, the Defense filed its opposition to the State's Motion.

5. On Friday, May 31, 2024, after the conclusion of pretrial interviews of two of the witnesses subject to the State's Motion, and after the close of business, the State served the Defense with its Reply in Support of the State's Motion, maintaining that the same nine (9) Defendant's witnesses should be excluded.

6. In an effort to streamline the issues before this Court as a result of the State's Motion, and in reliance on the State's continued request to exclude all nine of the witnesses listed on Defendant's May 6th disclosure, the Defense made a good faith effort to reduce the number of its witnesses by a significant margin, and consented to the relief sought by the State as to five of them.

7. On Sunday, June 2, 2024, at 6:28 pm, the Defense filed and served a Notice of Withdrawal of eleven Defense witnesses. Among the eleven withdrawn were five that, as of less than 48 hours prior, the State had requested to exclude in its May 6th Motion and May 31st Reply. With respect to the five witness that the State had requested to exclude, the Defense understood that, by consenting to the State's requested relief, those witnesses would be removed from this case by operation of law, and there would only be an outstanding issue before the Court as to the remaining four.

8. In accordance with this withdrawal, and in reliance on the State's position, the Defense withdrew three of its subpoenas, and promptly notified the witnesses of the same. This included two witnesses scheduled for pretrial interviews on Monday, June 3, 2024.

9. On June 3, 2024, at 9:49 am, the State filed a notice purporting to withdraw its motion to exclude certain witnesses ("State's Notice").

10. Contemporaneously, the State submitted an amended witness list ("State's Witness List"), adding two (2) of the witnesses it had sought to exclude in the State's Motion and Reply, as well as Hannah Gutierrez. The State failed to provide any good faith basis for its actions.

11. Undersigned counsel then requested that the Court set a pretrial conference to determine what unresolved issues remain before the Court in light of the State's actions. The State, through special prosecutor Kari Morrissey, promptly responded opposing this request.

Because of the State's Motion, the issue of witness exclusion was the subject of extensive briefing for nearly a month. A Court order excluding the five (5) Defense witnesses the State had sought to exclude, and the exclusion of which the Defense had consented to, is appropriate and necessary due to the fast-approaching trial and the State's ongoing, unprofessional gamesmanship. Defense counsel respectfully requests such an order.

II. Legal Authority

A) Exclusion

“Parties must obey discovery orders.” *State v. Le Mier*, 2017-NMSC-017, ¶ 24 (quoting *State v. Doe*, 1978-NMCA-124, ¶ 8, 92 N.M. 354) (“[U]pon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances.”)). Failure to do so undermines the efficiency of the judicial system. *See id.* “When a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court.” *Id.* ¶ 25.

Exclusion is a method of enforcing court orders. While exclusion is an severe remedy, trial courts have discretion to exclude witnesses as a sanction for a party’s failure to comply with the court’s scheduling order. “Courts must evaluate [...] culpability, prejudice, and lesser sanctions [...] when deciding whether to exclude a witness and must explain their decision to exclude or not to exclude a witness [...]” *State v. Le Mier*, 2017-NMSC-017, ¶ 20. However, “it is not the case that witness exclusion is justified only if all of the [...] considerations weigh in favor of exclusion.” *Id.* A trial court “may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced.” *Id.* (internal citation omitted).

In *State v. Le Mier*, the New Mexico Supreme Court held that it was within the trial court’s discretion to exclude a witness from trial as a sanction for the state’s failure to comply with Rule 5-501(A)(5) NMRA, as outlined in the court’s scheduling order. ¶ 23. There, the state failed to list the correct addresses for its witnesses named on the state’s witness list. *Id.* Furthermore, “if the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.” Rule 5-501(H) NMRA. Rule 5-505(B) NMRA provides that,

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may [...] prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney in contempt of court pursuant to Rule 5-112 of these rules.

B) Doctrine of Judicial Estoppel

“The doctrine of judicial estoppel 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.” *Matter of Est. of Kuchan*, 2024-NMCA-032, ¶ 11 (internal citations omitted). There are three elements that must be met to apply this doctrine:

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, while not an absolute requirement, judicial estoppel will be especially applicable when the party’s change of position prejudices a party who had acquiesced in the former position.

Id. Applying judicial estoppel maintains the integrity of the judicial process by preventing parties from manipulating the court system to their advantage by changing positions opportunistically.

C) Mootness Doctrine

As a general rule, courts do not decide moot issues or cases. *See Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 737 (citing *Mowrer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980)). “A case is moot when no actual controversy exists, and the court cannot grant actual relief.” *Id.* (internal citation and quotations omitted).

III. Argument

A) *Judicial Estoppel*

All three prongs under the doctrine of Judicial Estoppel are met.

First, the State assumed the position that Brian Bolman, Doran Curtin, Zachariah Sneesby, Jonathan Jaramillo, and Elizabeth Small should be excluded as witnesses from trial. They obtained the relief they sought based on the position that the late disclosure was prejudicial when the Defense consented to the State's requested relief of exclusion.

Second, the State's position in now adding witnesses they previously successfully sought to exclude is clearly inconsistent.

Third, the defense acquiesced in the State's former position when the Defense consented to the exclusion of the witnesses listed above. The State's blatant change of position has prejudiced the Defense in that they have now released a number of witnesses from subpoenas, with only two days remaining before the expiration of the Court-ordered pre-trial interview deadline. In its Notice of Withdrawal of Defense Witnesses, Defendant agreed to withdraw five (5) of the nine (9) witnesses identified in the State's Motion to Exclude and in their subsequent Reply. Further, in an effort to streamline this case for all parties as trial approaches, the Defense removed six *additional* witnesses from its witness list that it does not intend to call at trial: John Ziello, Jose Cortez, Steven Orr, Oliver McCartney, Ken Johnson, and Gabriel Gonzales.¹ The Defense clearly made strategic moves in reliance on the State's former position and has been prejudiced as a result of the State's change of position. These withdrawals were made as a group for a number of reasons and to articulate the prejudice further would require the Defense to reveal additional strategy to

¹ The State has removed no witnesses, even though it is patently unreasonable for the State to have more than 45 witnesses at an eight-day trial.

the State. However, the third prong has nonetheless been satisfied, which makes the Doctrine of Judicial Estoppel “especially applicable” according to *Kuchan*, 2024-NMCA-032, ¶ 11.

In its Friday night filing, the State continued to assert that it was prejudiced by the late disclosures, was unable to properly investigate, and was unable to move to preclude the witnesses listed on May 6, including the five the Defendant consented to exclude. Nothing happened in discovery between Friday night and Monday morning with respect to those witnesses *except* that the state got what it asked for Friday night.

From the moment of its filing, the State’s motion appeared frivolous. The fact that once the State obtained its proclaimed objective with respect to the majority of the witnesses it sought to exclude, the State withdrew the same motion less than one business day later evidences bad faith. At a minimum, the State’s actions fall squarely under the label of “manipulating the court system to their advantage by changing positions opportunistically,” such that the Court should step in to maintain the integrity of the judicial process as stated in *Kuchan*. The State pursued relief from the Court in bad faith, has wasted the resources of both the defense and of this Court, and should not be rewarded for its gamesmanship. The sort of gamesmanship demonstrated here by the State is precisely the type of situation the Doctrine of Judicial Estoppel is intended to prevent and the State’s opportunistic changing of positions is barred under this doctrine.

B) Mootness Doctrine

The State’s request to exclude the five witnesses that were the subject of the State’s Motion and consented to by the Defendant over the weekend mooted the controversy as to those witnesses. With the State’s request for their exclusion consented to, those witnesses had no further place in this case. As of Monday morning, that motion continued to be justiciable only as to the four witnesses not removed.

C) Exclusion is the appropriate remedy

The Defense has a right to withdraw its own witnesses from its trial witness list, and it has notified the State and the Court of said withdrawal. But the Defendant did not merely remove the witnesses—it consented to their *exclusion from trial on the State’s motion*. The State cannot force the Defendant to expend resources fighting motions to exclude witnesses, and then, when it gets its way, also be permitted to penalize the Defendant for making strategic decisions in response to the State’s position by selectively adding back the witnesses of its choosing. Nor can they file another trial witness list adding witnesses they sought to exclude nearly a month after the May 6 witness disclosure deadline and after the Defense has relied upon their motion practice. The Defense has operated in good faith, even if the State has not. The State should be estopped from adding the very witnesses they sought to exclude after the deadline for adding witnesses has passed.

Date: June 03, 2024

Respectfully submitted,

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By: */s/ Luke Nikas*

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CERTIFICATE OF SERVICE

I hereby certify that on June 03, 2024, a true and correct copy of the foregoing filed through the New Mexico Odyssey File & Serve system, which caused all counsel of record to be served by electronic means.

/s/ Heather M. LeBlanc

Heather M. LeBlanc