FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff, **No. D-101-CR-2024-00013**

vs. **Judge Mary Marlowe Sommer**

ALEXANDER BALDWIN,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE No.1 TO PRECLUDE IMPROPER PROSECUTORIAL CONDUCT AND REQUIRE AN ORDERLY TRIAL

COMES NOW the State of New Mexico by and through Special Prosecutors, Kari T. Morrisey and Erlinda O. Johnson, and hereby respectfully submits the following response to Defendant Alexander Baldwin's motion *in limine* number one to preclude improper prosecutorial conduct and require an orderly trial, and in support thereof submits the following.

1. **Improper Burden Shifting**

It is well-established that the prosecution cannot shift the burden to a criminal defendant to prove his own innocence. *See Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975). In determining whether a prosecutor engaged in burden shifting, courts consider the degree to which (1) the prosecutor specifically argued or intended to establish that the defendant bore the burden of proof; (2) the prosecution's actions constituted a fair response to the questions and comments of defense counsel; and (3) the jury was informed by counsel and the court about the defendant's presumption of innocence and the prosecutor's burden of proof. *See People v. Santana*, 255 P.3d 1126, 1131-32 (Colo. 2011).

However, prosecutors have "considerable latitude" to respond to an argument of opposing counsel. *United States v. Herron*, 432 F.3d 1127, 1136 (10th Cir. 2005). A prosecutor's arguments that a defendant's asserted bases for reasonable doubt are speculative are proper when made in response to comments made by the defense. *Id.*at 1132 (commenting on the lack of evidence confirming the defendant's theory is not impermissible burden-shifting). Indeed, the prosecution may properly comment in closing argument on the lack of evidence to support the defense theory, without improperly shifting the burden of proof. *See Sanchez v. Bryant*, No. 16-6027, 652 F. App'x 599, 606 (10th Cir. June 9, 2016) (unpublished) (denying a certificate of appealability on applicant's claim of prosecutorial misconduct based on improper burden-shifting in closing argument where prosecutor commented on a lack of evidence to substantiate applicant's defense theory, but also acknowledged the State's burden to prove guilt, which the evidence had established); *see also Morris v. Workman*, No. 09-6248, 382 F. App'x 693, 696 (10th Cir. June 11, 2010) (unpublished) (citing *United States v. Simpson*, 7 F.3d 186, 190 (10th Cir.1993) (collecting cases permitting prosecutorial comment on lack of evidence supporting defendants' theories); *Hooper v. Mullin,* 314 F.3d 1162, 1172-73 (10th Cir. 2002) (concluding that prosecutor's remark during closing that "it would have been a 'wild coincidence' if the defendant had not knowingly possessed the drugs found in his rental car" constituted fair comment on the evidence).

In this case, the State has no intention of presenting any arguments which shift the burden of proof to the defendant. However, the State notes it is entitled to present argument regarding the lack of evidence supporting defendant's theories of defense. *See Simpson*, 7 F.3d at 190; *see also United States v. Tucson*, 248 F. App'x 959, 962 (10th Cir. Sept. 28, 2007) ("The prosecutor clearly indicated that the government bore the burden of proof. His comments were limited to

pointing out to the jury that the defense had the ability to call Mr. Lucero as a witness if it had wished to do so. Under our case law, such comments are not improper."); *United States v. Trabanino*, 41 F. App'x 302, 305 (10th Cir. May 21, 2002) (holding that prosecutor's two comments in closing rebuttal that government is "not the only one that can subpoena witnesses" did not violate prohibition against comments on defendant's invocation of right not to testify, and thus did not constitute error); *Battenfield v. Gibson*, 236 F.3d 1215, 1225 (10th Cir. 2001) (holding that prosecutor's comments during closing arguments regarding defendant's failure to call certain witnesses or present certain testimony were proper where neither concerned matters that could have been explained only by the defendant).

New Mexico appellate courts have found that comments on the defendant's failure to produce witnesses are allowed so long as the comment is not one on the defendant's failure to testify. *See State v. Aguayo,* 1992-NMCA-124, ¶37, 835 P.2d 840; *cf. State v. Aaron,* 1984-NMCA-124, ¶¶ 19-20, 692 P.2d 1336 (concluding that comment on defendant's failure to call expert witness was not improper statement on defendant's silence but was permissible comment on his failure to produce witnesses); *see State v. Sanchez,* 1995-NMSC-053, ¶ 19 (citing *See State v. Macon,* 845 S.W.2d 695, 696 (Mo.Ct.App.1993) (holding that prosecutor's comments concerning defendant's lack of corroborating evidence does not constitute an improper shift of the burden of proof in light of the court's instructions on the state's burden); *see also People v. Medina,* 190 Colo. 225, 545 P.2d 702 (1976) (stating that prosecutor can comment on the defendant's failure to independently corroborate alibi testimony and on the lack of evidence confirming the defendant's theory of case)). Indeed, "[l]ack of corroborating evidence is a factor a jury might find relevant to the accuracy of a witness's memory as well as credibility." 1995-NMSC-053 at ¶19.

Here, the prosecution is within its right to present arguments in response to defendant's arguments or defense, *State v. Pennington,* 1993-NMCA-037, ¶ 25, 851 P.2d 494, as long as the prosecution does not comment on the defendant's right to remain silent and not testify.

2. **Vouching for the Opinion of the State**

While the State agrees that it is improper for counsel to vouch for a witness, *Pennington,* 1993-NMCA-037, ¶ 27, New Mexico recognizes the "invited-response" doctrine under which defense counsel's closing argument may "open the door" to comments by the prosecutor that otherwise would be improper. *See State v. Cordova,* 1983-NMCA-144, ¶ 18, 674 P.3d 533. "Prosecutors are permitted to comment on the veracity of witnesses so long as the statements are based on the evidence—not personal opinion—and are not intended to incite the passion of the jury." *State v. Dominguez*, 2014-NMCA-064, ¶ 23, 327 P.3d 1092.

In this case, the State intends to argue its case to the jury based on the evidence. However, defense counsel's arguments may open the door to the invited response doctrine. At this time, it is unknown how the arguments of counsel will unfold but prosecutors are aware of their obligations and intend to abide by them.

3. **Coaching witnesses**

The Supreme Court has made clear that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976)). As part of those actions, it is within the prosecutor's discretion to control the presentation of a witness' testimony as it is "fairly within [the prosecutor's] function as an advocate." *Imbler,* 424 U.S., at 430, n. 32. In analyzing prosecutorial

actions in preparation for trial in the context of prosecutorial immunity, the U.S. Supreme Court noted,

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. **Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial**. . .

Buckley, 509 U.S. at 273. "Prosecutorial decisions regarding witness testimony, including what witnesses to use at trial, and what questions to ask them, are activities intimately associated with the judicial phase of a criminal trial . . ." *See Spurlock v. Thompson,* 330 F.3d 791, 798 (6th Cir. 2003).

In this case, while the State agrees that a prosecutor must not "coach" a witness to testify falsely or to phrase a witness' testimony, *State v. Lopez,* 1986-NMCA-084, ¶¶ 41-42, 734 P.2d 738, thorough preparation demands that the prosecution interview and prepare witnesses before they testify. In fact, no competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. Absent evidence of "coaching", any intimation by the defense that meeting with witnesses prior to trial for trial preparation is improper must be precluded by this Court.

Using the Jury to reach a Verdict based on Anything Other than Evidence

The State agrees that neither side should argue to the jury anything but the evidence. The State does not intend to argue to the jury to convict for reasons other than the evidence.

Respectfully Submitted,

/s/*Erlinda O. Johnson*
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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 29th day of June 2024.

/s/ *Erlinda O. Johnson*
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