

**SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO,
COUNTY OF BERNALILLO**

STATE OF NEW MEXICO,

Plaintiff,

v.

No. D-202-CR-2026-00405

TIMOTHY BUSFIELD,

Defendant.

**DEFENDANT'S RESPONSE IN OPPOSITION TO STATE'S MOTION TO EXCLUDE
WITNESSES FROM THE EVIDENTIARY HEARING ON DEFENDANT'S MOTION
TO QUASH INDICTMENT**

Defendant Timothy Busfield, by and through undersigned counsel, respectfully responds in opposition to the State's Motion to Exclude Witnesses from the Evidentiary Hearing on Defendant's Motion to Quash Indictment (Motion). The State asks the Court to exclude every witness Defendant has identified because notice was provided one day later than Rule 5-601(F) contemplates. The State identifies no meaningful prejudice arising from that delay, because none exists, and it cites no authority permitting witness exclusion as a remedy under that Rule. The Motion fails for three reasons: Rule 5-601(F) does not authorize the sanction the State seeks; the State has had the names, contact information, and statements of these witnesses for months; and the narrow testimony Defendant intends to offer requires little, if any, preparation. Indeed, should the State stipulate to the three limited facts these witnesses would establish, no testimony will be necessary. The Motion should be denied.

Background

1. On June 15, 2026, Defendant filed his Motion to Quash Indictment, based on egregious and sustained prosecutorial misconduct before the Grand Jury.

2. The Motion rested, in large part, on the State's refusal to allow the grand jurors to hear from witnesses who were present and waiting to testify outside the Grand Jury room, despite members of the Grand Jury asking at least three times to hear from those witnesses.
3. On June 25, 2026, the State filed its opposition to that Motion.
4. Immediately thereafter, and before the completion of briefing, the Court, *sua sponte*, set the matter for an evidentiary hearing on August 25, 2026.
5. That hearing was, at the request of the State and over Defendant's objection, reset to September 25, 2026.
6. On September 22, 2026, the Tuesday before the Friday hearing, undersigned counsel emailed the State to advise it that Defendant "may" call any of seven witnesses who were present at the Grand Jury, and that the "primary focus" of their testimony "would be on their presence the day of the grand jury and willingness to testify without a subpoena." Email to Greer Staley, attached hereto as ***Defendant's Exhibit A***.
7. The email also listed Defense Investigator Pip Lustgarten, who would testify that the defense provided the Grand Jury prosecutor with a list of witnesses who were present and "available to testify." *Id.*; see also ***Defendant's Exhibit D to Motion to Quash (Corrected)***.
8. All of the witnesses referenced in the email, apart from Ms. Lustgarten, were listed on the original sheet provided to the prosecution at the Grand Jury hearing.
9. The email also stated that the State "should already have all of their affidavits, as they were attached to the detention opposition, and Mr. Caudillo's was attached to the Motion to Quash." ***Defendant's Exhibit A***. None of the witnesses has authored any statement other than those already in the possession of the prosecution.
10. Ms. Staley did not respond to undersigned counsel's email.

11. Instead, on September 23, 2026, the State moved to exclude all of those witnesses on the basis that they were disclosed in violation of Rule 5-601(F).

12. In violation of Rule 5-120(C)-(D), the State did not confer with the Defense or seek the Defense position before filing its Motion.

Argument

The State's Motion rests exclusively on Rule 5-601(F) and on Defendant's notification of potential witnesses four,¹ rather than five, days before the evidentiary hearing. For that one-day delay, the State seeks what our Supreme Court has described as "a severe sanction that raises questions about the fairness of the judicial process." *State v. Harper*, 2011-NMSC-044, ¶ 21, 150 N.M. 745. But nothing in Rule 5-601 purports to authorize any sanctions, let alone the exclusion of witnesses. Nor does the State identify any authority construing the Rule to permit such a sanction. *See Doe v. Lee*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 (the Court assumes that, "where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Rather, because witness exclusion is an extreme remedy, "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.* The Court should reject the State's invitation to impose that sanction, one that would frustrate the Court's fact-finding function, for a technical departure from a procedural timing requirement. *See State v. Manes*, 1991-NMCA-025, ¶ 2, 112 N.M. 161 (extreme sanctions inappropriate for technical violation of procedural rule).²

¹ Defendant counts each day, including the day of the notification and of the hearing.

² The State makes this argument despite having itself failed to seek Defendant's position on its Motion, as Rule 5-120(C)-(D) NMRA requires. Contrary to the State's assertion that it need not confer with Defendant "[d]ue to the nature of this motion," Motion at 2, Rule 5-120(D) requires that the movant seek the opposing party's position on every motion except those enumerated in

The State argues that exclusion is appropriate because the “Defense’s proffer regarding their ‘primary focus’ and referencing affidavits attached to unrelated motions is insufficient.” Motion at 2. This argument is unsupported by the record and misreads the Rule, which requires only that each party provide “the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement subject to discovery made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.” Rule 5-601(F). Defendant provided the names. The witnesses’ contact information was handed to the prosecution at the Grand Jury hearing, *see* Motion to Quash, and every statement subject to disclosure had already been produced, through the detention filings and, in Mr. Caudillo’s case, as *Defendant’s Exhibit G* to the Motion to Quash. Furthermore, the Motion to Quash clearly sets forth the facts intended to be adduced at the hearing and includes reference to each of the listed witnesses. The State cannot credibly claim surprise.

Defendant acknowledges that his notice was sent short of the five days the Rule contemplates. The delay was inadvertent. It is quite uncommon for parties to send witness disclosures ahead of motion hearings; indeed, undersigned counsel cannot recall ever having sent or received such a notification in this district before. However, in preparation for the hearing, undersigned counsel was reviewing the rules, saw the notice requirement in Rule 5-601(F), and emailed opposing counsel within fifteen minutes. This was not an effort to gain any advantage, and it has produced none. To the extent the Court deems it necessary, Defendant asks that the

the Rule: “(1) motion to dismiss; (2) motions regarding bonds and conditions of release; (3) motion for new trial; (4) motion for judgment notwithstanding the verdict; (5) motion to suppress evidence; or (6) motion to modify a sentence pursuant to Rule 5-801.” The State’s Motion to Exclude is none of those. Nor did the State respond to counsel’s email in any respect, ask for materials of any kind, or attempt to confer in good faith in any manner.

Court exercise its discretion under Rule 5-601(F) to order “a shorter period of time” within which the Defense would be compliant.

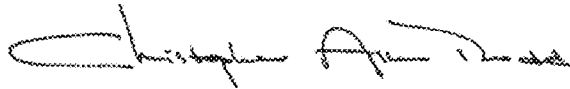
As set out above, the delay was inadvertent. And the State identifies no meaningful prejudice. It asserts only that it “is left in the position of having to potentially prepare for eight (8) witnesses in two days.” Motion at 2. That assertion fails for four reasons. First, the State was notified on the Tuesday before a Friday afternoon hearing, not two days in advance. Second, the Rule itself contemplates only five days; no appreciable prejudice can follow from receiving notice a single day short of that period. Even if the Court determines that the Defense should have provided its notice on Friday, September 19, 2026, the additional two workdays cannot amount to a meaningful prejudice. Third, as counsel’s email made clear, the primary focus of the testimony is limited to whether the witnesses were present outside the Grand Jury room, whether they were willing to testify without a subpoena, and whether the prosecution was aware of their presence. Such testimony requires no meaningful preparation, and it is difficult to conceive of rebuttal evidence the State could offer regarding a witness’s presence and willingness to testify before the Grand Jury. Fourth, the State has known of each of these witnesses, their knowledge of the events at issue, and their statements regarding the implausibility of the State’s allegations since January. The State has had those statements for *nine months*, and Mr. Caudillo’s second affidavit since June. The assertion that the timing of counsel’s email left the State unable to prepare rings hollow.

Defendant intends to call witnesses at the noticed hearing for the purpose of demonstrating that 1) each witness was present throughout the entire day outside of the Grand Jury room, 2) that each witness was available and willing to testify without a subpoena, and 3) that the Grand Jury prosecutor saw and was aware of those witnesses and their willingness to testify. In addition to these three points, Mr. Pierangeli may testify, consistent with Defendant’s Motion, regarding the

manner in which the Grand Jury prosecutor mischaracterized polygraphs and the polygraph evidence in this case. This presentation will not prejudice the State. That said, should the State elect to stipulate to those facts, Defendant will have no need to call witnesses at the upcoming hearing.

The State seeks the most severe remedy available, under a Rule that does not authorize it, for a brief delay that caused it no harm. The State now asks the Court not to hear from the same witnesses it unilaterally withheld from the Grand Jury. Defendant respectfully requests that the Court deny the Motion and, to the extent necessary, exercise its discretion under Rule 5-601(F) to shorten the notice period and deem Defendant's September 22, 2026, notice timely.

Respectfully submitted,



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I HEREBY CERTIFY that on September 23, 2026,
a copy of the foregoing pleading was filed via NM
File & Serve, which caused all counsel of record to
be served electronically.

/s/ Amber Fayerberg
Amber Fayerberg

Subject: Busfield Hearing
Date: Tuesday, 22 September 2026 at 3:19:39 PM Mountain Daylight Time
From: Amber Fayerberg
To: Greer Staley
CC: Rebekah Reyes, Savannah Brandenburg-Koch, Christopher Dodd, Maya Chandrakasan
Attachments: img-968dfdd6-2a24-4562-bb20-7bf1842f0b46.png

Hi Greer,

I am writing to let you know that we may call witnesses at Friday's hearing. I anticipate that their testimony would only be a few minutes each, as I expect its primary focus would be on their presence the day of the grand jury and willingness to testify without a subpoena.

I do not anticipate we will call all of them, but the following people present to testify:

- Jonathan Pierangeli (Polygrapher)
- Alan Caudillo (Director of Photography)
- Kristin Karr (Hair and Make-up)
- Debra Toner (Stand-In Actor)
- Jessica Ollech (Covid Nurse)
- Chris Ford (Driver and Security for Principal Actor)
- Joe Lotito (Line Producer)
- Pip Lustgarten (Investigator - would testify that prosecution was provided the list of available witnesses)

You should already have all of their affidavits, as they were attached to the detention opposition, and Mr. Caudillo's was attached to the Motion to Quash. See you Friday.

Best,

Amber Fayerberg
FAYERBERG
DODD

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Available In-Person:

Jonathan Pierangeli
Polygraph Examiner

[REDACTED]
[REDACTED]

Alan Caudillo
Director of Photography

[REDACTED]
[REDACTED]

Kristin Karr
Hair & Makeup Department

[REDACTED]
[REDACTED]

Debra Toner
Background, Stand-in, Actor

[REDACTED]
[REDACTED]

Jessica Ollech
Head Covid Nurse

[REDACTED]
[REDACTED]

Chris Ford
Driver and Security for Principal Actor

[REDACTED]
[REDACTED]

Joe Lotito
Line Producer

[REDACTED]
[REDACTED]

Available by Zoom or Telephone:

Copper Perry
Head of Hair Department

[REDACTED]
[REDACTED]

Erika Ortega
Mother of Child Actor on Seasons 3 & 4

[REDACTED]
[REDACTED]

Adan Ortega
Father of Child Actor on Seasons 3 & 4

[REDACTED]
[REDACTED]

Lehi Lazo
Mother of Child Actor on Season 4

[REDACTED]
[REDACTED]

Andy Sanchez
Father of Child Actor on Season 4

[REDACTED]
[REDACTED]

Kate Crowley
Assistant Costume Designer on All Seasons

[REDACTED]
[REDACTED]