

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

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
2/2/2024 11:54 AM
KATHLEEN VIGIL CLERK OF THE COURT
Marquel Gonzales-Aragon

STATE OF NEW MEXICO,

Plaintiff,

vs.

No. D-101-CR-2023-00040

HANNAH GUTIERREZ,

Defendant.

**STATE’S RESPONSE TO DEFENDANT’S MOTION FOR DISMISSAL, OR IN THE
ALTERNATIVE, TO SUPPRESS ALL DISCLOSURES AND USE OF ATTORNEY
CLIENT COMMUNICATIONS AND FOR RECUSAL OF THE PROSECUTORS**

COMES NOW, the State of New Mexico, by and through Special Prosecutors Jason J. Lewis and Kari T. Morrissey, and submits the following response to the defendant’s motion to dismiss.

INTRODUCTION

Defendant Gutierrez raises serious issues concerning the disclosure of attorney-client privileged communications and seeks the most severe relief from this Court in the form of a complete dismissal of the charges against her, or alternatively recusal of the prosecutors. She asserts that serious misconduct was afoot causing these disclosures, and the State agrees the disclosures were the result of serious misconduct with one difference: the State believes, and can prove, the misconduct is attributable to one person, and that person is the defendant’s own counsel. Because these disclosures were the direct result of cavalier legal representation by the defendant’s counsel, a dismissal of the charges and all other relief requested by defendant is unwarranted, and the defendant’s motion should be denied.

FACTS

On December 7, 2021, defendant and her legal counsel, Jason Bowles, signed a “Consent to Search Authorization” form provided by the Santa Fe Sheriff’s Office, permitting the office to obtain a complete forensic download of defendant’s iPhone cellular telephone. A copy of the signed form is attached hereto as **Exhibit 1**. The language on the form is clear and unequivocal, “If you consent to a search, anything of evidentiary value seized in the course of the search can and may be introduced into evidence in a court of law against you.” The form further states, “I authorize the Deputies/Detectives of the Santa Fe County Sheriff’s Office to seize any article of questionable nature, or contraband from my vehicle/residence/property, or any items that may be deem [sic] to be of evidentiary value.” “I give consent/permission freely and voluntarily without threats or promises of any kind, either express or implied, made to me or someone close to me to convince me to grant consent/permission to search the property described above.” (underlining added.) The form also contains a space on which “additional notes” may be written, such as any limitations on the scope of the extraction or on the subsequent filters applied to the extraction. Defendant made no notes in this area limiting the scope of the search, although the space does contain a notation that the extraction/search may be done without defendant being present. Thus a written contractual agreement was formed which allowed a complete forensic download/extraction of defendant’s iPhone and which expressly disavows that any other promises were made to defendant or anyone close to defendant to induce permission to search the phone.

When the Special Prosecutors viewed the forensic download report obtained from RFCL, it was clear large swaths of conversations were missing because conversations were incomplete, disjointed, and there were significant periods of time where no messages appeared. Consequently, the State requested a second filter of the messages. (Importantly, this request was not for a second search of the phone; rather, it was to take the existing extraction from the initial search and remove

any keyword filters that had been applied during the first report. This second report was much more complete and contained many of the suspected missing messages.) The second report was received by the State on July 11, 2023. Shortly after receiving the second report, the State received an Inspection of Public Records (IPRA) request from Seth Kenney, the report fell into the parameters of the request and was consequently provided as required by law. The State provided the report to Mr. Kenney approximately one day later. Given the press of other business at the time, the State did not immediately begin reading the report in full, and instead read portions of the report over many days. Based on undersigned counsel's memory, the report was over ten thousand pages long¹, and it took approximately two weeks before the State discovered the report contained messages between Mr. Bowles and the defendant. The State immediately stopped reading the report, and on July 25, 2023, notified Mr. Bowles of the existence of the report/messages. *See Exhibit 2.* The State also contacted Mr. Kenney, who agreed in writing to delete his copy of the report, although he had already provided a copy of the report to his attorney. The State never read the content of any of the messages between the defendant and her attorney nor has it attempted to use any of the messages in any way. The State immediately deleted the report from its prosecution servers and email accounts.

In comparison, the defendant let the report sit on the defense server² for one month and only asked that it be deleted after the State reminded defense counsel for a *second* time, on August 25, 2023, that they had yet to give permission to delete the report. *See Exhibit 3.* In the State's second notice to defense counsel, the State reminded Mr. Bowles the report was uploaded to the defense server and that the report would be deleted immediately upon their request, but would not

¹ Defendant's motion states the report is 18,096 pages long, which the State accepts as accurate.

² The defense server is the electronic storage repository created for sharing discovery with the defense team. The State uploads all discovery disclosures to this server so defendant has immediate access to discovery, including the ability to download from the server.

be deleted without their approval to avoid the State being accused of attempting to hide or destroy evidence. The State presumed defense counsel would want to download a copy of the report to determine the extent of the disclosure and then immediately have the report deleted. Instead, defense counsel waited one month to approve the deletion request, and only did so after a second notice from the State. Despite defendant currently arguing these communications were of vital importance and an egregious violation of defendant's rights, her lackadaisical approach to both the initial search and leaving them on the defense server for one month shows that the State was treating the communications with more care and concern than was defense counsel.

ARGUMENT

I. THE CONSENT TO SEARCH DISAVOWS ALL OUTSIDE PROMISES AND NO SIDE AGREEMENT WAS REACHED WITH CORPORAL HANCOCK TO LIMIT THE SEARCH

The Santa Fe Sheriff Office's written authorization to consent to search is clear and unambiguous in its terms, but defendant now cries foul and wants this Court to find that the Special Prosecutors should have been aware of an alleged side deal defendant's counsel made with then-Detective (now Corporal) Alexandria Hancock to limit the scope of the search. Yet defendant fails to explain how and why the prosecutors (and now this Court) should ignore the four corners of the written contractual search agreement that expressly disavows any side promises, and more importantly, how the prosecutors should have known in the first place about this alleged side deal that was not referenced in any way on the written consent to search form. Is it defendant's argument that the prosecutors are required to contact the signatories to every document they have before them to ask if the document represents the full terms of the agreement, or whether some secret, side deal exists? If so, that is absurd and not what the law requires. The basic tenets of contract law are clear that any written agreement is limited to the terms contained in the agreement and anything not included in the agreement must be ignored. Defendant offers no legal support for her proposition that the alleged side deal should be incorporated into the main agreement controlling

the terms of the extraction and search, and even if they had offered any legal support, it would ultimately be fruitless because the terms of the text messages are so vague as to be meaningless. To punish the State for the defendant's own negligence in failing to include limitations on the search form – limitations regarding messages the State knew nothing about – would be an absurd result.

Moreover, even if the Court were to find that the State is bound by this alleged side deal, the language contained in the messages exchanged between Corporal Hancock and Mr. Bowles is so vague and unclear that the State's actions still comport with the spirit of those terms. Attached as Exhibit A to defendant's Motion to Dismiss are the text messages between Mr. Bowles and Corporal Hancock. Mr. Bowles states, "Emailed you back. Hannah will consent just wants to see if it can be for pertinent time frame and not have like her private pictures etc downloaded." Corporal Hancock replies, "Nothing will be released whatsoever if it's not in relation. The DA continues to question about those photos the media pulled of her. I'm still trying to understand the relevance on their end." Mr. Bowles then states, "Ok that sounds good and I will tell her, I think there are some private pictures she has. On the phone. [sic] I'm just baffled by the questions on the pictures lol. Hannah did send me the explanation right away and they weren't taken on the Rust set." This is the totality of the conversation that defendant now relies upon to claim that the extraction and subsequent filter of the iPhone violated the alleged side-agreement. Despite defendant's assertions to the Court, Corporal Hancock never agreed to limit the extraction/search. Instead, she makes reference to not releasing any photos that are unrelated to the criminal investigation. She makes no promises that the search will be limited in any way; indeed, if she were agreeing to not search the phone for photos, there would be no need for her to mention releasing photos, because she would have none to release. Defendant's assumption that her counsel made an agreement with Corporal Hancock to limit the search is contradicted by the plain language

of the text messages. The actual agreement, to the extent there was an agreement at all, had nothing to do with limiting the search but instead was an agreement to not release any private photos to the media. Corporal Hancock was addressing the concern of private photos being released, if unrelated. This promise has been kept. No unrelated private photos of the defendant have been released, including in the IPRA response to Mr. Kenney.

Defendant's contention in her motion that "any reasonable person looking at this form would not draw the conclusion that discussions regarding the limits of the search would be thrown out or ignored" (MTD p. 3) is preposterous particularly coming from an experienced attorney³. Had defense counsel taken the time to read the form, it clearly states that no express or implied promises have been made to obtain the consent to search. This carelessness continued in the text messages with Corporal Hancock. There is nothing in the messages supporting the contention that an agreement was reached to limit the search of the phone – there was no meeting of the minds. At best it appears Corporal Hancock thought Mr. Bowles's concern was regarding the release to the media of private photos. In sum, the Court is precluded by basic contract law from incorporating defendant's text messages into the consent agreement, but even if the Court were to incorporate the messages, they still do not support defendant's contention that an agreement to limit the search was reached. Defendant cannot point to any provision contained in either the consent to search form or in the text messages to establish that the State knew or should have

³ Then co-defendant Alexander Rae Baldwin's counsel also agreed to a forensic download of Mr. Baldwin's phone, but took care to detail in writing all limitations on the consent to search. The State welcomed this attention to detail and abided by the terms of the written limitation. The State provides this information to the Court to dispute Ms. Gutierrez's claims that the consent form was somehow misleading by not being readily apparent to attorneys that outside promises would not be honored. Counsel for Mr. Baldwin understood that any promises made outside the consent to search form needed to be in writing and signed by both parties. They did not rely on hastily and vaguely written text messages or oral communications to preserve the attorney-client privilege. Instead, they specifically required the State to affirm in writing that any attorney-client text messages existing on Mr. Baldwin's phone would be exempt from any search, filter, and report. The State would have accepted a similar written agreement from Ms. Gutierrez, but the consent to search was given without limitation, and the State acted reasonably in accordance with the scope of the authorization granted by Ms. Gutierrez and her attorney.

known attorney-client messages were on the phone and that they should be excluded from any extraction, search, or filtered report. Defendant fails to establish any wrongdoing by the State generally or the Special Prosecutors specifically to warrant the extreme remedies of dismissing the case or recusing the prosecution team.

The string of cases cited by defendant to suggest the Special Prosecutors should have set up “taint teams” or other procedures to filter out attorney-client privileged materials are inapposite to the facts here. In the cited cases, the defendant’s property was seized by the government, which of course created a duty to ensure the privilege was protected. Here, the defendant consented to a full forensic download and search of her phone, with no limits on the search incorporated into the consent. In the defendant’s motion, she states the messages between her and defense counsel amount to “several hundred pages of conversation” (MTD p. 4) and that her primary legal strategy attempting to show Mr. Kenney was responsible for the live rounds is “discussed between her and her counsel on the text messages that the government sent to Mr. Kenney. This adverse witness had access to both fact and opinion work product of Mr. Bowles on the key issue in this case that concerns Mr. Kenney. The mental impressions of Mr. Bowles were shared with Ms. Gutierrez Reed who in turn shared her mental impressions with Mr. Bowles... This defense strategy was discussed with discussion on how discrete pieces of evidence relate to Kenney as the source of the live rounds on set.” (MTD p. 6).

Initially, it is unfathomable to the State that an attorney would be having such critical and detailed discussions concerning the defense strategy over text messages. It is equally unfathomable that, knowing these discussions were on the phone, defense counsel and defendant would sign a complete and full consent to search form without noting in writing anywhere on the form that these messages should be excluded from the search. This is outrageous conduct and attempting to claim that the State “knew or should have known” these conversations were on the phone is laughable.

The two people who knew or should have known were defendant and Mr. Bowles, and it was their duty to protect the privilege of these conversations – not the State’s.

II. DEFENDANT WAIVED PRIVILEGE

Although the plain language of the consent to search form and contract law should be sufficient to deny the defendant’s motion, the defendant’s motion is further stymied by Court rule. The New Mexico Rules of Evidence, Rule 11-511 states, “A person who possesses a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is a privileged communication.” Here, even if the Court were to accept defendant’s assertions that the consent to search was somehow modified by the text messages between Mr. Bowles and Corporal Hancock, those text messages do not include any language excluding from the search attorney-client conversations. The consent to search form is a complete authorization to search and it certainly does not contain any language limiting the search to exclude attorney-client conversations. There is nothing in any of the evidence defendant points to which states that conversations between defendant and any of her attorneys is excluded from the search. Rather, the consent form provides an unlimited disclosure of everything on the phone. Because Mr. Bowles knew he had been communicating with the defendant via text message, he should have acted as any reasonable attorney would under similar circumstances and included a prohibition against the search and seizure of attorney client information on the phone. Because he and defendant both consented to and signed the search authorization form, they consented to the disclosure of the communications. Under these circumstances, the privilege is waived pursuant to N.M.R.Evid. 11-511.

Individuals seeking to preserve the privilege must act affirmatively to do so. Signing full search authorization forms knowing that the search would uncover protected communications, but

failing to exclude those records from the search, is the worst way to protect privileged communications. So too is relying on vague text messages – promises that are specifically disavowed by the search authorization form - and that do not contain any language limiting the search in any way whatsoever. Defendant admits knowing attorney-client protected communications were on the phone but consented to a full search anyway. In so doing, she has waived the privilege pursuant to this rule. She cannot now blame the Special Prosecutors for accessing this information and subsequently disclosing it pursuant to a lawful IPRA request. Defendant needed to do more and should have done more to protect these communications. This is a situation of her own making and asking the Court to penalize the State and Special Prosecutors is an absurd request which should be denied outright.

Furthermore, dismissing the indictment or granting any other relief to the defendant would permit all criminal suspects going forward to engage in gamesmanship with law enforcement and prosecutors. If the Court were to rule that the State cannot rely on clearly written, unambiguous consent to search forms that contain no limitations and instead must first seek to determine whether any secret, side-agreements not noted on the form might exist, it would make the entire purpose of having a written consent form worthless. The onus is on the person granting the consent to clearly outline any limitations on the scope of the consent – not on the State to intuit the existence of possible, secret agreements.

Although there is no New Mexico law directly on point, other jurisdictions have considered situations similar to defendant's and have ruled that privilege was waived. In *Mailin Muy v. IBM*, 2020 U.S. Dist. LEXIS 264678, 2020 WL 13470562, the U.S. District Court for the Northern District of Florida considered a case where a plaintiff in a civil action turned over a cell phone to the defendant for downloading. Although there were discussions between the parties that limitations on the scope of the search needed to be set, an agreement was never reached, and the

plaintiff provided the phone anyway. The defendant was able to obtain a complete copy of the contents of the phone, including messages between plaintiff and her attorneys. The court in that case held that the plaintiff waived privilege when she put the phone into the defendant's hands without having a clearly defined set of limits on the search and allowed the download to take place. Similarly, in *Garcia v. Stemilt AG Servs., LLC*, 2022 U.S. Dist. LEXIS 133093, the court stated, "Waiver of the attorney-client privilege or work-product doctrine may be express or implied. 'An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public.' *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). Thus, 'once documents have been turned over to another party voluntarily, the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries.'" *Id.* at 720.

CONCLUSION

The facts and law do not support the request relief requested by the defendant. The defendant and her counsel signed an unlimited consent to search waiver despite knowing significant privileged communications were stored on the phone. The defendant took a careless attitude toward protecting these disclosures by failing to note any search limits on the consent form, and instead now tries to rely on vague text messages as evidence of a side agreement reached with Corporal Hancock. Those messages, even if accepted by the Court, at best demonstrate an agreement to not release publicly photos from the device. The State and its prosecutors acted reasonably under the situation and made diligent efforts to both notify and contain the spread of the communications once they were discovered. The State should not be penalized under the facts here, and nor should the defendant be rewarded for engaging in sleight of hand with regard to the fully signed consent to search agreement.

WHEREFORE, for the foregoing reasons, the State respectfully requests the Court deny defendant's motion to dismiss and for other relief.

RESPECTFULLY SUBMITTED,

/s/ Jason J. Lewis

Jason J. Lewis

Kari T. Morrissey

Special Prosecutors for the State of New Mexico

1303 Rio Grande Blvd., NW Suite 5

Albuquerque, NM 87104

Phone: 505-361-2138

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was emailed to opposing counsel this 2nd day of February 2024.

/s/ Jason J. Lewis

Jason J. Lewis



Sheriff Adan Mendoza – amendoza@santafecountynm.gov
 Undersheriff Ken Johnson – kjohnson@santafecountynm.gov

35 Camino Justicia, Santa Fe, NM 87508
 Office: (505)986-2455 Fax: (505)986-2410

Consent to Search Authorization

Case #: <u>2021007949</u>	Date: <u>12/7/2021</u>
Location: <u>RCFL - Albuquerque</u>	Time: <u>3:10 PM</u>

BEFORE ANY SEARCH IS MADE, YOU MUST UNDERSTAND WHAT YOUR RIGHTS ARE:

- You may refuse to consent to search and demand that a search warrant be obtained prior to any search described below.
- If you consent to a search, anything of evidentiary value seized in the course of the search can and may be introduced into evidence in a court of law against you.

I, Hannah Cortez-Reed, HAVING READ THE ABOVE STATEMENT OF MY RIGHTS, AM FULLY AWARE OF WHAT MY RIGHTS ARE AND HEREBY VOLUNTARILY GIVE CONSENT TO A SEARCH WITHOUT A WARRANT BY SANTA FE COUNTY SHERIFFS OFFICE REPRESENTATIVE Detective Alexandria Hancock

VEHICLE:	Year:	Make:	Model:
Color:	Plate:	VIN:	

PHONE/PHONE EXTRACTION:	Make: <u>Apple</u>	Model: <u>iPhone A2342</u>
Carrier: <u>AT&T</u>	Serial No: <u>IMEI 357771750121142</u>	Passcode: <u>6666669</u>

RESIDENCE/PROPERTY:	Location:
Description:	

Additional notes:

Authorization to do the extraction/search without being present.



Sheriff Adan Mendoza – amendoza@santafecountynm.gov
Undersheriff Ken Johnson – kjohnson@santafecountynm.gov

35 Camino Justicia, Santa Fe, NM 87508
Office: (505)986-2455 Fax: (505)986-2410

I authorize the Deputies/Detectives of the Santa Fe County Sheriff's Office to seize any article of questionable nature, or contraband from my vehicle/residence/property, or any items that may be deemed to be of evidentiary value.

By signing below, I am providing written consent/permission for the above named Deputy/Detective(s), or their designee(s), to conduct the search without obtaining a warrant and seize any evidence outlined above. I give consent/permission freely and voluntarily without threats or promises of any kind, either express or implied, made to me or someone close to me to convince me to grant consent/permission to search the property described above.

I will not hold the Sheriff of Santa Fe County, or any agent acting on behalf of the Sheriff's Office liable.

Hannah Gutierrez Reed Jason Bowles 12-7-21
Printed Name Signature Date & Time

Jason Bowles [Signature] 12-7-21
Witness Printed Name Signature Date & Time

From: Kari Morrissey ktm@morrisseylewis.com
Subject: Re: Hannah's cell extraction
Date: July 26, 2023 at 2:21 PM
To: Todd Bullion toddjbullion@gmail.com, Jason Bowles jason@bowles-lawfirm.com
Cc: Jason J. Lewis jjl@jjllaw.com



Were you all able to locate the folder? It will be in a recent disclosure folder and the main file is titled New Mexico and within that you will find a PDF named "messages" and that contains all of the messages. It's very lengthy. Let me know if you need further assistance.

Kari

On 07/25/2023 12:55 PM MDT Todd Bullion <toddjbullion@gmail.com> wrote:

Kari,

Can you please send me the link to the folder where this info is on the server?

Todd J. Bullion
4811 Hardware Dr NE
Bldg D, Suite 5
Albuquerque, NM 87109
[505-494-4656](tel:505-494-4656)



On Tue, Jul 25, 2023 at 12:51 PM Jason Bowles <jason@bowles-lawfirm.com> wrote:

Kari thank you for this and appreciate you sending us this. And we appreciate your efforts in this regard. We did make clear to Alex, I did actually in discussion that no attorney client communications would obviously be extracted and she said words to the effect of, of course not or something like that. It was understood though that she knew she wasn't entitled to those and nor would she get them. I again appreciate your efforts and candor in this regard. I just need to think about this and with Todd and get back to you

Sent from my iPhone

On Jul 25, 2023, at 12:43 PM, Kari Morrissey <ktm@morrisseylewis.com> wrote:

Jason and Todd

It has come to my attention that the second cell extraction I requested contained text messages between you and your client. Immediately upon realizing this I deleted our copies of the extraction and did not read/review the messages between you and your client and confirmed the same with Jason Lewis. **Let us know what you want us to do with the copy of the extraction that is on the defense disclosure server. I did not want to remove it without your consent.** I have instructed our cell expert to re-disclose the extraction without the attorney/client communications.

When I originally requested Detective Hancock provide the the data from RCFL to our expert she mentioned nothing about the existence of any attorney/client communications or any potential limitations on the scope of the extraction. I believed that the text messages between you and your client were not a part of the extraction. Moreover, I reviewed the signed consent and saw no limitations on the consent. Unfortunately, shortly after receiving the extraction and well before realizing the extraction contained attorney/client communications, I received an IPRA request from Seth Kenney and disclosed the text messages (photos and videos were not disclosed). Mr. Kenney became aware of the existence of the extraction after I called him and asked him a couple of questions about messages between your client and one of her friends that discussed Mr. Kenney's potential involvement. I did this to ensure the integrity of the testimony that I intend to extract during future hearings/trial. I have reached out to Mr. Kenney and requested that he delete his copy of the extraction due to the inadvertent disclosure and the clear privilege of the communications. Mr. Kenney agreed to delete his copy but did state that he provided a copy to his counsel. I have not contacted his counsel at this point but will stipulate to a protective order. I believe very strongly in the attorney/client privilege and will consider anything you propose to suppress the communications. Let me know how you wish to proceed.

Kari

STATE'S
EXHIBIT 2

Re: Gutierrez cell report

Jason Bowles <jason@bowles-lawfirm.com>

Fri 8/25/2023 9:51 AM

To: Kari Morrissey <ktm@morrisseylewis.com>

Cc: Todd Bullion <toddjbullion@gmail.com>; Jason J. Lewis <jjl@jjllaw.com>

Yes thank you, we give consent for deletion.

Sent from my iPhone

> On Aug 25, 2023, at 9:48 AM, Kari Morrissey <ktm@morrisseylewis.com> wrote:

>

>

> Jason and Todd

>

> On 7/25 I explained that I would not remove the cell report that contained the privileged communications without your consent. You have not given me your consent to delete the file but I really think we need to delete the file so there is no chance that anyone can access it. Do I have your permission to do that? I'm assuming you have downloaded it and have a copy for your file. Please confirm.

>

> Kari

**STATE'S
EXHIBIT 3**