

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

STATE OF NEW MEXICO,

Plaintiff,

v.

No. D-101-CR-2023-00040

HANNAH GUTIERREZ,

Defendant.

RESPONSE TO MOTION TO DISMISS FIRST AMENDED INFORMATION

THE STATE OF NEW MEXICO, by and through Special Prosecutors Kari T. Morrissey and Jason J. Lewis, hereby submit the following response to Defendant Hannah Gutierrez’s Motion to Dismiss First Amended Information. For its response, the State submits the following:

INTRODUCTION

On October 21, 2021, Halyna Hutchens was shot and killed when a firearm used on the “Rust” movie set contained a live round, rather than an inert dummy round as intended. “Rust” movie production hired Defendant Hannah Gutierrez as the Armorer on the movie set, and as such she was responsible for checking the firearm and ammunition prior to each use to ensure that live rounds never made their way into the firearm. Defendant Gutierrez failed at this simple task and Ms. Hutchens died as a result. On February 17, 2023, the State filed a First Amended Information against Defendant Gutierrez charging her with two alternative counts of involuntary manslaughter, in contravention of N.M.S.A 1978, § 30-2-3(B).

In her motion, Defendant Gutierrez takes an “everything but the kitchen sink” approach and provides four primary (and several sub-) reasons why the information should be dismissed: 1. The prosecution team was unauthorized; 2. The prosecution presents due process, equal protection and ethical violations of defendant’s rights; 3. Evidentiary problems require dismissal; and 4. Cumulative error. The bulk of the motion is spent dealing with the issues related to the appointment of the first special prosecutor and the statements made to the media by District Attorney which the defendant alleges are prejudicial. For the reasons explained below, none of the reasons provided in defendant’s motion warrant a dismissal of the information or any lesser curative action.

ARGUMENT

I. Arguments Concerning First Amended Information Being Invalid Are Moot

a. No Improper Influence is At Play

Defendant Gutierrez’s first argument concerns the fact that the First Amended Information was signed by District Attorney Mary Carmack-Altwies, rather than by Special Prosecutor Andrea Reeb, and that improper political motives contributed to the decision to file the Information. All of these issues have been cured by the appointment of new special prosecutors, who are conducting an independent review of the evidence and making independent prosecutorial decisions.

On March 30, 2023, Special Prosecutors Kari T. Morrissey and Jason J. Lewis entered their appearance on behalf of the State of New Mexico in this matter. Prior to their appointment, Defendant Gutierrez filed a motion to disqualify Special Prosecutor Reeb and challenging the propriety of the District Attorney acting as co-counsel where a special prosecutor was appointed. Prior to completion of briefing, Special Prosecutor Reeb resigned but the Court requested briefing on the issue of the District Attorney acting as co-counsel. After completion of briefing and a hearing, on April 21, 2023, the Court entered an order finding that the District Attorney could not

co-counsel or have continued decision-making authority in these matters if she elected to appoint a Special Prosecutor. The District Attorney then decided to remove herself from the case and proceed with special prosecutors. Since that time, the District Attorney has not made any decisions in the case, nor has she instructed the special prosecutors to make any decisions in this case.

Upon their appointment, Special Prosecutors Morrissey and Lewis began an independent review of the evidence in both the present case and the companion *State v. Baldwin*, Case No. D-101-CR-202300039, matter. The special prosecutors invited counsel for both defendants to provide any evidence and arguments they wanted the special prosecutors to consider concerning the continued prosecution of the defendants. Counsel for both defendants availed themselves of this opportunity.

Based on the information presented by counsel for Defendant Baldwin, the special prosecutors determined there were serious issues concerning the evidence which warranted further investigation and consequently they entered a *nolle prosequi* in the *Baldwin* matter. Comparatively, no evidence has been presented in the *Gutierrez* matter which would warrant a dismissal. However, the steps taken by the current special prosecutors demonstrate they are acting independently and are not bound by prior prosecutorial decisions. Whatever alleged motives Defendant Gutierrez attempts to claim were in play by Special Prosecutor Reeb do not apply to the current special prosecutors. The independent review by the current special prosecutors and the subsequent change in charging decisions show the current special prosecutors are free of any alleged improper influence and that the special prosecutors are making their own decisions in this matter. As to Defendant Gutierrez, the fact that the current special prosecutors came to the same charging decisions as the prior prosecutors is not evidence of continuing alleged undue motive.

b. Political Ambitions Did Not Influence Charging Decisions

That said, it is important to review the supposed political motives Defendant Gutierrez alleges were in play. The entirety of her argument surrounds a flippant and joking e-mail Special Prosecutor Reeb sent to District Attorney Carmack-Altwies, attached here to as Exhibit A. This email shows that Ms. Reeb's intention was, in fact, to **not** announce that she was going to be the special prosecutor, specifically assuring District Attorney Carmack-Altwies that she would not disclose to any media personnel that she had been chosen as special prosecutor. Then, in a clear joking aside, Ms. Reeb states, "At some point, though, I'd at least like to get out there that I am assisting you as it might help in my campaign lol." District Attorney Carmack-Altwies replied that it was her intent to announce Ms. Reeb's appointment at some future date, once the investigation was handed over to the DA's office. **Nearly two months later, and after the primary election was already over**, on August 3, 2022, the District Attorney's office announced Ms. Reeb's appointment. Compelling evidence of political impropriety this is not.

Had Ms. Reeb been serious in her desire to make the announcement of being appointed as special prosecutor in order to aid her campaign, it defies logic that the announcement would come nearly two months later, and after the primary election was over. Moreover, to the extent her request could be construed as serious, it was rejected. District Attorney Carmack-Altwies responded by saying that an announcement would only come after the investigation was complete, with no timeline promised, and not contemporaneously with Ms. Reeb's jovial request. Indeed, time reveals that District Attorney Carmack-Altwies acted exactly as she said she would: nearly two months later, and after the investigation was released by the Sheriff's office, only then was Ms. Reeb's appointment announced. As will be discussed in more detail below, dismissal is not appropriate under these facts.

c. The Signature Issue Has Been Resolved

Neither is dismissal warranted because District Attorney Carmack-Altwhies signed the First Amended Criminal Information. Contemporaneously with the filing of this response, the special prosecutors have filed a Second Amended Criminal Information under their own signature. As previously stated, having undertaken their own evaluation of the evidence and having allowed the defendant an opportunity to produce any evidence for consideration, they have determined that the present charges are supported by probable cause and warranted by the facts. Consequently, a Second Amended Criminal Information has been filed to resolve any dispute over whether these charges are the result of a co-counsel relationship that the Court has since deemed improper, and instead represents the decision making of the current special prosecutors. Consequently, any argument that the First Amended Information is signed by the incorrect party is moot, and dismissal on these grounds is unwarranted.

In her motion, Defendant Gutierrez presented the appropriate standard for the sanction of dismissing a case. Dismissal of criminal charges is an “extreme sanction to be used only in exceptional cases,” *Mathis v. State*, 1991-NMSC-091, ¶ 13, 112 N.M. 744, 747, 819 P.2d 1302, 1305. “[I]n fashioning a sanction, the Court must also take into account the public’s interest in the prosecution of the defendant, and for that reason the “extreme sanction” of dismissal is “to be used only in exceptional cases.” *State v. Jackson*, 135 N.M. 689, 694, 92 P.3d 1263, 1268 (Ct. App. 2004).

In *Mathis*, the court granted dismissal of a case which involved egregious discovery violations and the failure by the police to provide exculpatory evidence, and only after the court conducted two hearings on the matter and twice ordered the materials to be provided to the defense. *Id.* ¶¶ 5-7. Not only did the defendants in that case never receive the evidence, but the discovery

morass caused an 18-month delay in the case, which was wholly attributable to the investigatory agency. *Id.*, ¶ 8. In *Jackson*, the court reversed a trial court’s dismissal when the prosecution was unable to provide discovery and potentially exculpatory evidence after order by the court to do so, when that evidence was in the possession of the county, and not in the possession of the prosecutor or investigative agency. *Jackson*, pp. 690-691. In each case, the court weighed whether dismissal was appropriate, balancing the defendants’ rights to due process and fairness with the interests of justice. In one case, they found dismissal was warranted, and in the other case, they did not.

The prosecutorial actions alleged by Defendant Gutierrez, even if taken as true, do not rise to the level of impropriety warranting dismissal. In the singular case defendant cited in which a dismissal was upheld, the court found that the defendant was wholly unable to mount a defense because of the investigating agency’s refusal to provide discovery materials. An email with a single line clearly meant to be taken jokingly and which was nevertheless completely disregarded and not acted upon, together with a First Amended Criminal Information with the district attorney’s signature rather than the special prosecutor’s signature do not present an insurmountable obstacle to the defendant being able to defend herself, nor are they violations of such magnitude to warrant the extreme sanction of dismissal. On the contrary, the balance weights in favor of permitting the prosecution to continue, and because the public’s interest in holding the defendant accountable outweighs any alleged minor and technical violations¹.

Importantly, the defendant fails to raise any argument to address the second consideration established by the court, which is that court “must also take into account the public’s interest in the prosecution of the defendant, and for that reason the ‘extreme sanction’ of dismissal is ‘to be

¹ As previously stated, the First Amended Criminal Information has since been amended to be signed by the current special prosecutors, which the State believes makes this argument moot. Moreover, a dismissal without prejudice would be a waste of judicial resources because the State could and would simply re-file the charges, eventually bringing the case right back to its current state, but only after significant delay and unnecessary cost.

used only in exceptional cases.” *Jackson*, 694, 1268. Both the First and Second Amended Criminal Information, and the facts included in defendant’s own motion establish that an important public interest is at risk in this case, and demonstrate why the continued prosecution of Defendant Gutierrez is appropriate. Conversely and to her detriment, Defendant Gutierrez makes no claim the State lacks sufficient evidence to support the charges brought against her nor that an important public interest is lacking; rather she simply argues that an email sent in jest and which was not acted upon, together with a co-counsel relationship that has since been cured warrants letting someone whose unconscionable actions led to the death of a young mother should be freed of all criminal liability. That is hardly the outcome anticipated by the holdings of either *Mathis* or *Jackson*. Consequently, the extreme and unusual sanction of dismissal is unwarranted under the law and the facts of this case.

II. Pre- and Post-Indictment Statements Have Not Prejudiced Defendant.

In her motion, Defendant Gutierrez makes conclusory accusations that the District Attorney made improper statements in the days after the shooting took place and specifically takes issue with statements made during an October 26, 2021, interview with the *New York Times*. (See Motion, p. 3, FN 3). Indeed, the District Attorney provided some limited comments to the *Times*, as there was extreme interest by the media and the public concerning the incident, given that it occurred on a movie set and involved a well-known actor. A copy of the complete interview is attached hereto as Exhibit B. Contrary to defendant’s assertions, the district attorney made no improper statements that could be considered prejudicial or cause harm to Defendant Gutierrez in any way. The complete set of comments included in the interview were:

“We haven’t ruled out anything.” “Everything at this point, including criminal charges, is on the table.” “There were an enormous amount of bullets on this set, and we need to find out what kinds they were.” “It was a legit gun.” “It was an antique-era appropriate gun.” “It’s probably weeks, if not months, of follow-up investigation that we’re going to need to get to the point of

charging.” “We have complex cases all the time. But this kind of complex case, with these kinds of prominent people, no.”

There is absolutely nothing in these statements that is prejudicial to Defendant Gutierrez. She is not named, no criminal action(s) are attributed to her, she was not vilified or otherwise made the subject of public ridicule or condemnation. In sum, there is nothing in these statements which violate Defendant Gutierrez’s due process or equal protection constitutional rights or which would prevent her from receiving a fair trial.

Moreover, they do not violate New Mexico’s Rules of Professional Conduct or ABA Model Rules for public statements made by lawyers participating in a criminal case. Although the ABA Model Rules do not provide specific information about when lawyers generally, and prosecutors in particular, should discuss their cases in the media, they do focus on circumstances in which lawyers may not speak extrajudicially. Under the ABA Model Rules, all lawyers, including prosecutors, may not make extrajudicial statements that they “know or reasonably should know will be disseminated to ...the public,” and that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding.” See ABA Model Rule 3.6 (a): Trial Publicity.

Furthermore, ABA Model Rule 3.6(d) restricts all lawyers who are participating in the investigation or litigation of a case, **including defense counsel**. To the extent Defendant Gutierrez alleges the State has violated these rules, the condemnation must equally apply to her own counsel, who granted multiple televised interviews, issued numerous statements to the press, and who deviated greatly from the admonition to provide factually-based information only.

On October 29, 2021, defense counsel Jason Bowles and Robert Gorence (Gorence has since withdrawn from Defendant Gutierrez’s defense team) issued the following statement:

She would like to address some untruths that have been told to the media, which have falsely portrayed her and slandered her. Safety is Hannah's number one priority on set. Ultimately this set would never have been compromised if live

ammo were not introduced. Hannah has no idea where the live rounds came from. Hannah and the prop master gained control over the guns and she never witnessed anyone shoot live rounds with these guns and nor would she permit that. They were locked up every night and at lunch and there's no way a single one of them was unaccounted for or being shot by crew members. Hannah still, to this day, has never had an accidental discharge. The first one on this set was the prop master and the second was a stunt man after Hannah informed him his gun was hot with blanks.

Hannah was hired on two positions on this film, which made it extremely difficult to focus on her job as an armorer. She fought for training, days to maintain weapons, and proper time to prepare for gunfire but ultimately was overruled by production and her department. The whole production set became unsafe due to various factors, including lack of safety meetings. Rhnot [sic] the fault of Hannah.

Hannah and her legal team will address more of these rumors and the whole incident in an upcoming statement next week.

Continuing on November 3, 2021, Bowles (sometimes along with Gorence) participated in a cavalcade of televised media interviews:

“Today” Morning News Interview - November 3, 2021



<https://www.youtube.com/watch?v=n9J4GKAiX0A>

During the “Today” morning show interview, Bowles and Gorence made the following statements, which introduced an unsupported theory that other crew members who were unhappy with the set decided to place a live round into the gun:

“We’re assuming somebody put the live round in that box, which if you – if you think about that, the person who put the live round in the box of dummy rounds had to have the purpose of sabotaging this set. There’s no other reason you would do that.” “I believe that somebody who would do that would want to sabotage the set, want to prove a point, want to say that they’re disgruntled, they’re unhappy. And we know that people had already walked off the set the day before, and they had been – and they’re unhappy.”

They went on to introduce additional false information into the public domain, including that Defendant Gutierrez properly checked the gun before handing it to a co-defendant, David Halls. “Yes, she – in fact, Savannah, that did happen. She did spin the cylinder for him. She did show him each and every round in that chamber, which there were six. There were six dummy rounds she believed to be in that handgun. She spun it and showed it off to Mr. Halls.”

“Good Morning America” - November 3, 2021

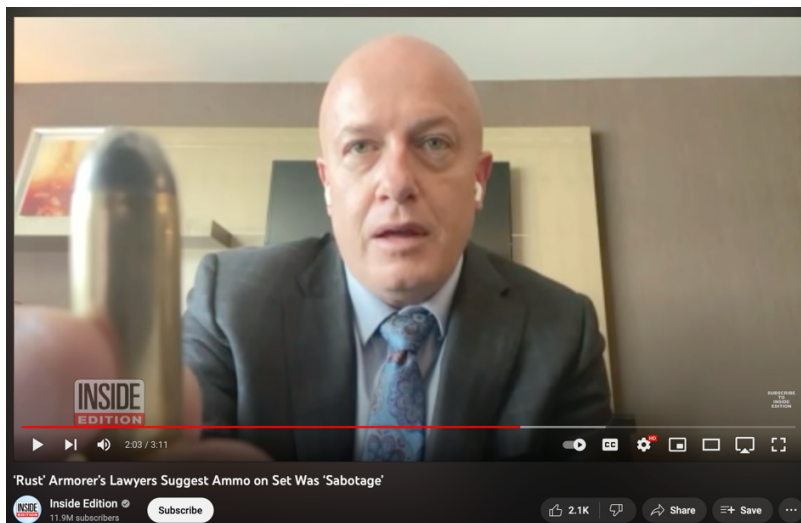


<https://www.youtube.com/watch?v=C7r6yVy2K68>

During the “Good Morning America” interview, also on November 3, 2021, Bowles continued to peddle what the District Attorney believed to be misinformation concerning the case. “We’re afraid that could have been what happened here, that somebody intended to sabotage this set with a live round, intentionally placed in a box of dummies.” “Now, we’re not saying that

anybody had any intent there was going to be a tragedy, a homicide. But they wanted to do something to cause a safety incident on set.” When asked by the host if he had any evidence to support that, Mr. Bowles stated, “Well, the biggest evidence we have is that there is a box of dummies and there’s live rounds in that box. We know Hannah did not put the live rounds in that box.”

November 4, 2021 – “Inside Edition”



<https://www.youtube.com/watch?v=p5fwZs3RTIM>

On November 4, 2021, Mr. Bowles appeared on “Inside Edition.” During this interview, he made the most direct statements of sabotage to date: “I believe this is the possibility of actual sabotage.” “We’re not ruling anybody out in our investigation. We’re looking at everything, and there were people disgruntled on the set, they had walked off the day before.” Additionally, he again attempted to shift blame to co-defendant Halls, stating, “The armorer did check it. She spun the rounds – the cylinder for Mr. Halls. Mr. Halls then had the duty to check it and had to ensure before he handed it to somebody else.”

KOAT Channel 7 – On or about February 1, 2023



https://www.youtube.com/watch?v=l_E-NmJYyn4

It's now 2023, and Mr. Bowles continues the media frenzy, along with his new co-counsel, Todd Bullion. In this interview, they make claims that Defendant Gutierrez was prevented by co-defendant Halls and other members of production from checking the gun to ensure no live bullets were included in the cylinder. Bowles states, "She wasn't called in by Mr. Halls, very simple and very tragic." "...Mr. Halls is a first AD, is in charge of safety on that set, knew that armorer had to do that check, had to then hand it to Baldwin. He did not call her back in, and that was a failure on his part." "She was not allowed to do her job in the way that she wanted to." They also make allegations that Defendant Gutierrez was cleared of liability by OSHA, and that the prosecutors did not know the facts of the case very well. "But they – they had not, in my opinion, reviewed the facts closely. In my opinion, they don't know the facts very well."

TMZ Live – On or about February 3, 2023



<https://www.youtube.com/watch?v=rxH7xkM3TpI>

On or about February 3, 2023, Mr. Bowles makes his second appearance on “TMZ Live²” and makes additional accusations against other crew members, alleging that they may have had a role in the shooting. “In fact, Hannah asked Halls if they could use a plastic gun, if they could use a – and Halls said, ‘No. We want to use a real gun.’...And she said, ‘Okay. Well, I have to do my prop duties. If there’s going to be use of that gun by Baldwin, call me back in so I can do my normal check. I can go through everything and make sure we have safety.’ And then Halls took the gun, she said he would, never called her back in.” In this interview, Mr. Bowles is attributing actual quotes to co-defendants in the case. Mr. Bowles also states that no one could have predicted that there would be live rounds on set, despite the fact that both dummies and blanks are made from live rounds and the checks are in place specifically to ensure that a mix-up has not occurred.

In sum, Mr. Bowles made numerous appearances on multiple television programs to spread misinformation about the case and to try to taint the jury in favor of his client. A prosecutor is not required to stay silent under these circumstances. Indeed, she has a duty to ensure that other

² Mr. Bowles previously appeared on “TMZ Live” on or about April 27, 2022.

co-defendants receive a fair trial, and was permitted to rebut the parade of misinformation spread about by Mr. Bowles.

New Mexico Rules of Professional Conduct, Rule 16-306 (A), Trial Publicity, states, “A lawyer shall not make any extrajudicial or out-of-forum statement in a proceeding that may be tried to a jury that the lawyer knows or reasonably should know: (1) is false; or (2) creates a clear and present danger of prejudicing the proceeding.” The Committee Commentary goes on to state in Footnote 6,

Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

It is perplexing that Defendant Gutierrez would complain about pre-trial publicity when it was her own attorney who elected to appear on any news program that would have him. Defendant Gutierrez seems to be under the misimpression that the rules concerning extrajudicial statements apply only to the prosecution but not to her own attorneys. This, of course, is untrue. Moreover, the prosecution is permitted to respond to statements made by defense counsel to lessen the adverse impact on the adjudicatory proceedings.

Defendant Gutierrez has failed completely to establish that District Attorney Carmack-Altways and/or Ms. Reeb knew or should have known that any statements they made were false or that they created a clear and present danger of prejudicing the proceeding. In actuality, the

statements made by prosecutors immediately after the shooting were nothing more than a basic recitation of the facts known at the time and did not unduly prejudice defendant or cause her to become the object of public condemnation.

After the defendant's attorneys went on their media tour and began to spread unfounded conspiracy theories that the live bullet was purposely planted by someone else, that another crew member wanted to cause anarchy on set by having a live round be discharged so that they could get better hotel rooms, and attempting to place blame on other crew members or co-defendants, the prosecutors had every right to respond, and did so factually, fairly, and within the established rules. The defendant has provided not one citation to law that would require the dismissal of this action because of the prosecutors' extrajudicial statements, and in fact would have no way of showing that her own attorney's media appearances were not responsible for any misinformation in the public domain. Defendant Gutierrez' motion to dismiss on these grounds fails completely.

III. Continuing Prosecution of the Case is Appropriate and Necessary to Obtain Justice for the Victim

First, Ms. Carmack-Altwhies and her office took no significant part in the investigation of the case until the law enforcement completed its investigation at the end of October 2022. Aside from approving search warrants, neither Ms. Carmack-Altwhies, her assistants, her investigators or Ms. Reeb participated in the law enforcement searches, questioned witnesses, or any related matters. In a single instance, an assistant district attorney provided suggested questions to a detective conducting an interview of defendant. It is unknown if the detective even used these suggested questions. Moreover, the previous prosecutors did not have subpoena power until the charges were filed in January 2023.

The defendant relies upon *Hollenbeck* in her argument that the case should be dismissed prior to a preliminary hearing because the "prosecution team" who investigated and charged the

defendant was not authorized, making the continuation of the case constitutionally invalid. Like defendant's other arguments, this assertion fails. Not only does the assertion fail but defense counsel grossly misrepresented this case and its holding to the Court. In *Hollenbeck*, the New Mexico Court of Appeals reversed the conviction of the defendant and remanded the case back to the district court with instructions to dismiss the indictment. The indictment was dismissed *without* prejudice and the defendant was swiftly reindicted by the state and the defendant was subsequently convicted of sex offenses. In the instant case, the previous prosecutors stepped down prior to the preliminary hearing and the information filed has been amended. Problem solved.

Defendant's next failing argument is that the case should be dismissed because Ms. Reeb participated in the prosecution of the case while having a conflict of interests due to her position as a state legislator. Ms. Reeb is no longer prosecuting the case and stepped down from prosecuting the case prior to a preliminary hearing taking place. Defendant Gutierrez is simply complaining that she continues to be prosecuted in any fashion. While we understand that being criminally charged is inconvenient and upsetting, Ms. Gutierrez is the most culpable defendant in a case that resulted in the senseless death of another person and the current prosecution team is dedicated to proceeding with the prosecution of Ms. Gutierrez in a fair and ethical manner.

Defendant argues that Mr. Hall received a favorable plea agreement after his lawyer donated \$250.00 to Ms. Reeb's political campaign. This is significantly less money than undersigned counsel has in her wallet at this moment. It is unfathomable that a criminal defendant in a high-profile homicide case was granted special treatment in exchange for \$250.00. Moreover, Ms. Reeb returned the money after she became aware of it. Mr. Halls was offered a plea to a misdemeanor as he is the least culpable of the defendants in this case. Mr. Hall's primary failure on the date of incident was that he relied on Defendant Gutierrez to perform her job duties as

expected. He took responsibility for his failings and has agreed to cooperate with the prosecution should he be called upon in the future. The current prosecutors have not yet determined whether he will be called as a witness. Finally, criminal prosecutors are not and should not be bound by OSHA findings.

Defendant Gutierrez has failed to articulate with any specificity how she is prejudiced by the actions of any of the previous prosecutors. The previous prosecution team interviewed two witnesses, David Halls and Sarah Zachry. There is nothing unusual or extraordinary about prosecutors taking proffers from potential witnesses or co-defendants. The previous prosecutors consulted with one expert witness, Bryan Carpenter. Mr. Carpenter was hired as a consultant and possible expert witness so that the prosecution could be educated about the duties of an armorer, producer and other roles held by movie set crew members. The consultation with Mr. Carpenter was (and still is) more than appropriate.

Ms. Gutierrez is not being selectively prosecuted. She is being appropriately prosecuted because her primary function as an armorer on the Rust movie set was to ensure gun safety. Her reckless failure resulted in the senseless death of another human being. All Defendant Gutierrez needed to do was shake every bullet and make sure it rattled before putting it in the gun – she failed and killed someone. Moreover, Defendant Gutierrez has previously been sued civilly for providing the keys to her motorcycle to an intoxicated person who was predictably involved in a motor vehicle accident that resulted in someone's death. Witnesses in the current case will testify that Defendant Gutierrez was drinking heavily and smoking marijuana in the evenings during the shooting of Rust. It is likely that Defendant Gutierrez was hung over when she inserted a live bullet into a gun that she knew was going to be used at some point by an actor while filming a shooting scene with other actors and crew members. The crime of involuntary manslaughter was

designed specifically for this type of circumstance. Defendant Gutierrez has a history of reckless conduct that has resulted in loss of human life and it is in the public interest that she finally be held accountable.

Defendant Gutierrez' claim that pre-accusation delay should result in the dismissal of the case is laughable. Fifteen months is not a significant delay. The district attorney's office received the investigation from the Santa Fe County Sheriff in October 2022 and filed charges three months later. Even if the previous prosecutors suspected early in the investigation that charges may later be filed, they needed to wait to receive the full investigation from the investigating law enforcement agency before proceeding against any defendants. Just because they may have known they might proceed on some charges does not mean they had made all charging decisions at that time. If Defendant Gutierrez believed that the lawyers involved in the case should not be responding to media inquiries, she might have mentioned that to her own attorneys who used the media to spread a completely unfounded theory of sabotage to deflect attention from Gutierrez' obvious criminal culpability.

IV. Evidentiary Problems do not Support Dismissal

As with many criminal cases, not all questions can or will be answered. While it is true that the origin of the live rounds remains undetermined, the current prosecution team is making a herculean effort to determine the identity of the person(s) responsible for the live rounds being introduced to the movie set. Defense counsel is well aware of the investigative efforts being made by the current prosecutors and the investigation is ongoing. There is some evidence to support the theory that Defendant Gutierrez herself may be responsible for the introduction of the live rounds on set and if this theory is confirmed additional criminal charges may follow.

The current prosecution team is aware that Ms. Zachry discarded some rounds of ammunition in a panic after the shooting and in an attempt to make the set safer. Ms. Zachry has not been charged with tampering with evidence. Prosecutors are also aware that Defendant Gutierrez unloaded the gun after the shooting, passed the rounds of ammunition off to at least one other person on set and walked off with the firearm for a considerable amount of time prior to law enforcement arriving on scene. Defendant Gutierrez has not been charged with tampering with evidence. Nothing about this prosecution has or will be selective.

The Sheriff's Department did not seek fingerprint or DNA evidence from the live rounds found on set. First, the FBI does not conduct DNA testing on bullet casings (spent or unspent) because the casing is too smooth for DNA to adhere to. Any such request by the Sheriff's office would have been met with a refusal. The FBI will reluctantly conduct fingerprint analysis on bullet casings but will testify that fingerprints are rarely found on casings due to the surface, exposure to heat, handling during the manufacture process, etc. It is worth noting that Defendant Gutierrez was in possession of four spent casings with nickel primers that appear to match the live rounds found on set. These spent casings were located in her gun kit bag and the current prosecution team did request fingerprint testing on these casings. Predictably, no suitable latent prints were detected. However, these casings will be sent to the state's independent expert for further testing.

The sear of the gun used in the killing of Ms. Hutchins was broken during testing at the FBI. The ballistics expert at the FBI notified law enforcement that the testing may result in damage to the gun and law enforcement proceeded with the testing. No one from the prosecution team (current or past) was notified or asked for comment prior to this decision being made. This issue is appropriately heard by the Court after the preliminary hearing in a motion to suppress. See *State v. Ayon*, 2022-NMCA-003 (A district court's dismissal of the matter at the preliminary hearing

without prejudice after determining the police officer who arrested defendant did not have reasonable suspicion to detain him was reversed, and the case was remanded since the district court's authority at a preliminary hearing does not include the authority to determine the illegality of evidence, the plain language of N.M. R. Ann. 5-302 contained no authorization for the district court to consider whether evidence was illegally obtained at a preliminary hearing).

There is currently no reason to believe that the damage to sear of the gun creates any prejudice to any defendant and certainly not to Defendant Gutierrez. She had every reason to believe the gun would be shot by Alec Baldwin in the vicinity of other actors and crew members after she recklessly loaded it with a live round. Any possible malfunction of the gun does not lessen her culpability. The gun and broken sear have been sent to the state's independent expert for further testing. The charges against Alec Baldwin were dismissed **without prejudice** because a possible malfunction of the gun significantly effects causation with regard to Baldwin, not with regard to Gutierrez. If it is determined that the gun did not malfunction, charges against Mr. Baldwin will proceed. The prosecution anticipates making a final charging decision with regard to Mr. Baldwin within the next sixty days.

Next Defendant Gutierrez attacks the validity of the search warrants. None of the search warrants in this case are defective. Not surprisingly, defense counsel does not cite a single New Mexico case or statute to support his frivolous claim. The law controlling search warrants in New Mexico is contained in 5-211 NMRA 1978. There is no requirement at all that the search warrant list a specific crime being investigated. However, a crime was clearly being investigated because a live round was shot out of a prop gun on a movie set resulting in a person's death.

The defense has been provided all discovery and evidence. The discussion between Ms. Reeb and Ms. Carmack-Altweis regarding Ms. Reeb's political campaign is not exculpatory under

the law and the emails pertaining to the conversation have been provided to defense counsel prior to a preliminary hearing.

There was no “unofficial test” inside Ms. Carmack-Altwies’ office concerning a firearm. Ms. Carmack-Altwies asked one of her investigators to educate her on the mechanics of a revolver so she would be more astute in terms of the nuances of the investigation. The gun used was not even the same make and model as the gun used in the killing of Ms. Hutchins. The prosecutor is not required to turn over discovery related to her every action.

There is a round of ammunition in evidence that appears to be a “dummy” round but does not make a sound as a “dummy” round should. This round and many other pieces of evidence have been sent to the State’s independent expert for testing as defense counsel is well aware (defense counsel approved the state’s motion to transfer evidence from the Santa Fe Sheriff to Lucien Haag). There is no reason to believe this evidence is exculpatory but the parties will have the answer soon enough.

Any and all relevant information from the public has been provided to defense counsel. The prosecution is not required to notify defense counsel every time a citizen calls with information that has no evidentiary value. Hundreds of such calls from around the world from gun owners and people with too much time on their hands have been received by the DA’s office and other local agencies. People have called to give their opinions as to the prosecution of the case, unfounded and/or nonsensical theories and/or the dismissal of the charges against Alec Baldwin. These calls have no evidentiary value whatsoever.

V. Cumulative Error

Now we arrive at defendant’s claims of cumulative error. Having established that defendant’s error claims fail or are so minor and technical as to be nothing more than mere

nuisance, so too must fail her claim of cumulative error. The New Mexico Supreme Court has set a high bar for proving claims of cumulative error. Although Defendant Gutierrez failed to provide the court with any legal standard for determining whether cumulative error exists, the State will provide it.

In *State v. Carrillo*, 2017-NMSC-023 ¶ 53, 399 P.3d 367, 380, the New Mexico Supreme Court stated, “The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial.’ *State v. Ortega*, 2014-NMSC-017, ¶ 53, 327 P.3d 1076 (internal quotation marks and citation omitted). ‘The doctrine of cumulative error is to be strictly applied, and . . . cannot [be] invoke[d] if the record as a whole demonstrates that [the defendant] received a fair trial.’ *State v. Samora*, 2013-NMSC-038, ¶ 28; 307 P.3d 328 (alterations and omission in original).” The only error defendant points to with any potential merit is that the First Amended Criminal Information was signed by the district attorney rather than the special prosecutor. Importantly, the document was signed before this Court found that a co-counsel relationship between the district attorney and special prosecutor was impermissible. Regardless, the State has corrected this potential error by contemporaneously filing with this response a Second Amended Criminal Information signed by the current special prosecutors, rendering this concern moot. And, even if the signature by the district attorney was in error, it was not an error of such magnitude to warrant dismissing the case altogether because it in no way impedes the defendant’s ability to receive a fair trial.

Defendant Gutierrez has not proven any of her underlying claims: she has not shown that the extrajudicial statements made by the prior prosecutors were in violation of the New Mexico Rules of Professional Conduct or the constitution, she has not shown any improper bias

or motivation in bringing the charges against her by the prior prosecutors, and she has not shown that the search warrants or evidentiary issues about which she prematurely complains were improper in any way. Where there has been no or only slight individual error, there can be no cumulative error.

All of Defendant Gutierrez's complaints fail and accordingly, her motion to dismiss should be denied.

Respectfully submitted,

/s/ Kari T. Morrissey
Kari T. Morrissey
Jason J. Lewis
Special Prosecutors
1303 Rio Grande Blvd. NW, Ste. 5
Albuquerque, NM 87104
T: 505-361-2138

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June 2023, I served the forgoing pleading to all parties or counsel of record:

/s/ Kari T. Morrissey
Kari T. Morrissey

Felicia M. Lujan

From: Mary Carmack-Altwhies
Sent: Monday, March 6, 2023 3:27 PM
To: Felicia M. Lujan
Subject: FW: contract
Attachments: 20220609_FIRST JUDICIAL DISTRICT ATTORNEY.pdf

From: Mary Carmack-Altwhies
Sent: Thursday, June 9, 2022 5:00 PM
To: Andrea Reeb <andrea@reeblaw.org>
Cc: Brenda Rael <BRael@da.state.nm.us>
Subject: Re: contract

I think we'll have to or we can redo it when we have the whole investigation.

I am intending to either introduce you or send it in a press release when we get the investigation!

Brenda - can you sign for me or use my stamp thingy?

Sent from my iPhone

On Jun 9, 2022, at 4:49 PM, Andrea Reeb <andrea@reeblaw.org> wrote:

One you have it signed, if you can scan it right back and I will email it to PERA. Thanks! I assume we redo at new physical year? Otherwise it's 22 days? I also won't talk to the press and will leave that all to you Mary. At some point though, I'd at least like to get out there that I am assisting you...as it might help in my campaign lol. Andi

Exhibit A

“Good afternoon,

Please see the statement below from DA Mary Carmack-Altwies regarding the Rust case:

“To dispel any rumors about the Rust case, I am providing the following official update. As I have previously stated, once the First Judicial District Attorney’s Office (“FJDA”) receives the completed investigation from the Santa Fe County Sheriff’s Office (“SFSO”), the FJDA will begin the screening process and any necessary follow-up investigation. To date, my office has received portions of the Rust investigation from SFSO but is still awaiting the balance of supplemental reports including, but not limited to, the following: FBI firearm and tool mark analyses, forensic testing on the firearm itself, the forensic download from Suffolk County PD of Mr. Baldwin’s phone, and the pathology report from the New Mexico Office of the Medical Investigator. Once SFSO receives those—and any other outstanding items—and completes its supplemental reports, the screening process will begin, and my team and I will make a charging decision. To expedite the FJDA review process, I have added retired Ninth Judicial District Attorney, Andrea Reeb to the team, as a special prosecutor for this case. To remain transparent to the local and national community, the FJDA will proactively disseminate information as it becomes available.”

Respectfully,
Franchesca Perdue
Data and Communications Specialist
First Judicial District Attorney’s Office
505-428-6984”

Exhibit B