

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

STATE OF NEW MEXICO

Plaintiff,

vs.

ALEXANDER RAE BALDWIN III,

Defendant.

No. D-0101-CR-202300-039
Judge Mary Marlowe Sommer

**DEFENDANT'S NOTICE OF UNLAWFUL ENHANCEMENT AND
MOTION NOT TO BIND OVER ENHANCEMENT**

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Counsel for Defendant

Defendant Alexander Baldwin files this notice to inform the Court that the government has unlawfully charged an enhancement under the firearm-enhancement statute, NMSA 1978, § 31-18-16. Mr. Baldwin also respectfully requests that that the Court decline to bind over that enhancement.

INTRODUCTION

The prosecutors in this case have committed an unconstitutional and elementary legal error by charging Mr. Baldwin under a statute that did not exist on the date of the accident. The Information states that the second alternative count of involuntary manslaughter “shall be enhanced pursuant to the firearm enhancement statute, §31-18-16, NMSA 1978.” But at the time of the accident, October 21, 2021, the firearm-enhancement statute applied only when “a firearm was *brandished* in the commission of a noncapital felony,” and it defined “brandished” to mean “displaying or making a firearm known to another person while the firearm is present on the person of the offending party *with intent to intimidate or injure a person.*” NMSA 1978, § 31-18-16(A), (D) (eff. July 1, 2020 to May 17, 2022) (emphases added). The government’s statement of probable cause contains no allegation that Mr. Baldwin acted “with intent to intimidate or injure a person,” and its description of the alleged conduct makes clear that the tragic death of cinematographer Halyna Hutchins was an accident.

It thus appears that the government intended to charge the current version of the firearm-enhancement statute, which was not enacted until May 18, 2022, seven months *after* the accident. That version no longer requires that a defendant “brandished” a firearm, instead imposing a five-year additional sentence when “a firearm was discharged in the commission of a noncapital

felony.” NMSA 1978, § 31-18-16(C) (eff. May 18, 2022). But under the Ex Post Facto clauses of the United States and New Mexico Constitutions, as well basic principles of statutory interpretation, that version of the statute could not apply to conduct that occurred before it was enacted.

Accordingly, that enhancement should not be bound over. Application of the current version of the statute would be unconstitutionally retroactive, and the government has no legitimate basis to charge Mr. Baldwin under the version of the statute that existed at the time of the accident.

BACKGROUND

This prosecution arises out of a tragic accident that took place on October 21, 2021, on a movie set near Santa Fe. While the cast and crew were rehearsing a scene for the Western film *Rust*, a firearm held by Mr. Baldwin discharged a live round that hit Ms. Hutchins and director Joel Souza. Ms. Hutchins died of her wound.

After a fifteen-month investigation, the District Attorney and the appointed special prosecutor announced on January 19, 2023 that they would file two involuntary-manslaughter charges against Mr. Baldwin and seek to impose a firearm sentencing enhancement. The District Attorney stated in a press release that “[t]he firearm enhancement makes the crime punishable by a mandatory five years in jail.”¹ Shortly after announcing the charges, the District Attorney gave

¹ *News Release from DA Mary Carmack-Altwies on Charges Against Alec Baldwin, Hannah Gutierrez-Reed*, SANTA FE NEW MEXICAN (Jan. 19, 2023), <https://www.santafenewmexican.com/news-release-from-da-mary-carmack-altwies-on-charges->

an interview to CNN in which she stated: “Just because it is an accident doesn’t mean that it’s not criminal.”² She added: “Our involuntary manslaughter statute covers unintentional killings, unintentional homicides. Unintentional means they didn’t mean to do it, they didn’t have the intent to kill, but it happened anyway.”³

On January 31, 2023, the government filed an information charging Mr. Baldwin with two alternative counts of involuntary manslaughter under NMSA 1978, § 30-2-3(B). The last sentence of the second alternative count states: “This offense shall be enhanced pursuant to the firearm enhancement statute, §31-18-16, NMSA 1978.” Information filed Jan. 31, 2023 (“Information”).

On the same day, the government filed a statement of probable cause. Consistent with the District Attorney’s public statements and television interviews, the statement of probable cause alleges that Mr. Baldwin “acted with reckless disregard and/or more than mere negligence in this incident” and “with willful disregard of the safety of others,” but it does not allege that Mr. Baldwin acted with the intent to intimidate or injure another person. Statement of Probable Cause filed Jan. 31, 2023 (“Probable Cause Statement”). To the contrary, it makes clear that Mr. Baldwin had been practicing a scene with the guidance of Ms. Hutchins and Mr. Souza when the gun

against-alec-baldwin-hannah-gutierrez-reed/article_f843a8fc-9814-11ed-9526-032214a2e9cb.html.

² Ray Sanchez, *Why Santa Fe District Attorney Decided To Charge Alec Baldwin over ‘Rust’ shooting*, CNN (Jan. 19, 2023), <https://www.cnn.com/2023/01/19/us/santa-fe-alec-baldwin-rust-charged/index.html>.

³ *Id.*

discharged, and it alleges that the death of Ms. Hutchins was the result of a failure to follow safety protocols, not an intentional effort to intimidate or injure another person.

ARGUMENT

Mr. Baldwin respectfully requests that the Court decline to bind over the firearm enhancement. Even taking the government's allegations as true solely for the sake of this motion,⁴ those allegations do not meet the statute's requirements. On the date of this accident, the firearm-enhancement statute applied only if Mr. Baldwin "brandished" a firearm during the commission of an offense, NMSA 1978, § 31-18-16(A) (2020), and the statute's definition of "brandished" required acting with the "intent to intimidate or injure a person." *Id.* § 31-18-16(D) (2020). But the government has not even alleged that Mr. Baldwin acted with such an intent.

Instead, the prosecutors committed a basic legal error by charging Mr. Baldwin under a version of the firearm-enhancement statute that did not exist on the date of the accident. In May 2022, the New Mexico Legislature amended the statute to add a five-year enhancement for "discharg[ing]" a firearm. L. 2022, Ch. 56, § 30.

⁴ Mr. Baldwin intends to contest the numerous false allegations contained in the Probable Cause Statement at the appropriate time and therefore reserves all rights.

The following chart reproduces the relevant language of the two statutes:

Firearm-Enhancement Statute on Date of Accident:

A. When a separate finding of fact by the court or jury shows that a firearm was brandished in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by three years

D. As used in this section, “brandished” means displaying or making a firearm known to another person while the firearm is present on the person of the offending party with intent to intimidate or injure a person.

Firearm-Enhancement Statute as Amended on May 18, 2022:

C. When a separate finding of fact by the court or jury shows that a firearm was discharged in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by five years

It appears from the District Attorney’s statements (including statements to the public and on television that Mr. Baldwin faced a five-year mandatory sentence) that the prosecutors intended to charge Mr. Baldwin under the May 2022 version of the statute. But it is clear that the firearm enhancement cannot apply here as a matter of law: application of the current version would be unconstitutionally retroactive, and the government lacks probable cause or any legitimate basis to charge the version in effect at the time of the accident.

First, enforcing the current version of the firearm-enhancement statute against Mr. Baldwin would violate the Ex Post Facto clauses of the both the United States and New Mexico Constitutions. *See* U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; N.M. Const. art. II, § 19. Those clauses apply not only to laws that create new offenses, but also to laws that increase punishment for existing offenses. As the New Mexico Supreme Court has explained, “a statute that increases

the punishment allowable for a previously committed offense violates the ex post facto ban.” *State v. Ordunez*, 2012-NMSC-024, ¶ 17, 283 P.3d 282. Indeed, the United States Supreme Court has even held that it would be unconstitutional to retroactively apply *advisory* sentencing guidelines. *See Peugh v. United States*, 569 U.S. 530, 532-33 (2013). As both high courts have put it, “[t]he *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.” *Ordunez*, 2012-NMSC-024, ¶ 14 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)).

Given those long-settled constitutional limitations, retroactively applying an enhancement that increases the basic sentence for a charged offense by five years (from eighteen months to six and a half years) would be flagrantly unconstitutional. But this Court does not even need to reach that question to dismiss the enhancement. Both “the presumption against retroactive legislation” and “the requirement that courts must try to adopt an interpretation that upholds the constitutionality of the statute” require construing the May 2022 amendment not to apply to offenses committed before its enactment. *Ordunez*, 2012-NMSC-024, ¶¶ 14, 20. And nothing in the statutory text suggests that the Legislature intended the law to apply retroactively.

Second, the government lacks any legitimate basis to charge Mr. Baldwin under the version of the firearm-enhancement statute that existed at the time of the accident. As explained above, that enhancement applies only where the defendant acted “with intent to intimidate or injure a person.” NMSA 1978, § 31-18-16(D) (2020). The government’s statement of probable cause nowhere alleges that Mr. Baldwin acted with such an intent. To the contrary, the factual allegations are flatly inconsistent with an intent to injure or intimidate. The statement alleges that at the time the weapon was discharged, Mr. Baldwin “was practicing drawing and pointing the weapon for

the scene with guidance and instruction from Halyna Hutchins and Joel Souza,” who “were viewing the practice scene on a monitor attached to the camera.” Probable Cause Statement at 2. And the statement further alleges that “[h]ad BALDWIN performed the required safety checks with the armorer, REED, this tragedy would not have occurred.” *Id.* at 5. Those allegations make clear that the tragic death of Ms. Hutchins was an accident that occurred while Mr. Baldwin was practicing a scene and that he did not act with the intent to intimidate or injure another person.

For that reason, the government lacks any legitimate basis to charge the version of the firearm enhancement that existed at the time of the accident. Accordingly, the enhancement should not be bound over.

Mr. Baldwin has good cause to seek a judicial resolution of this purely legal question as soon as possible. For one, the court should not sign a bindover that includes an unconstitutional enhancement (as applied), or an enhancement that is inapplicable on its face, simply because the government made a basic legal error in its charging decision.

Moreover, the District Attorney and the special prosecutor in this case have repeatedly stated to media outlets that Mr. Baldwin is facing many years in prison, while in reality he faces zero to eighteen months, even if this Court concludes at the preliminary hearing that probable cause supports the involuntary-manslaughter charges.⁵ Their public statements could potentially

⁵ See Interview by Sean Hannity with Andrea Reeb (Jan. 21, 2023), <https://www.foxnews.com/video/6319006222112> (special prosecutor misstating that “there would be the mandatory five years in prison if [Mr. Baldwin] was convicted if they find that he used a firearm”); Interview by Jeanine Pirro with Mary Carmack-Altways and Andrea Reeb (Jan. 19, 2023), <https://twitter.com/JudgeJeanine/status/1616239686262947841> (District Attorney commenting that the firearm enhancement of five years “is in fact mandatory”).

taint a jury pool by “heighten[ing] public condemnation of the accused” for no legitimate purpose whatsoever given that the statements rest solely on the government’s own legal error. Nat’l Prosecution Standards, NAT’L DIST. ATTNY ASSOC. (3d ed.) § 2-14.2. Precisely to avoid that sort of prejudice, the New Mexico Rules of Professional Responsibility prohibit a prosecutor from making an extrajudicial statement that she “knows or reasonably should know . . . is false” and explains that statements are likely to have a “prejudicial effect” when they discuss “the fact that a defendant has been charged with a crime” without noting the presumption of innocence. N.M. R. Prof’l. Cond. 16-306(A)(1) & cmt. 4(6). A judicial resolution of the question of the applicability of the firearm enhancement now would help prevent further erroneous and prejudicial public statements.

CONCLUSION

Mr. Baldwin respectfully asks the Court to decline to bind over the firearm enhancement.

Date: February 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2023, I electronically filed the foregoing with the Clerk of the Court using the Court's electronic filing system, which caused all participants and counsel of record to be served, as more fully reflected on the Notice of Electronic Filing.

/s/ Heather LeBlanc _____
Heather LeBlanc