

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

STATE OF NEW MEXICO,

Plaintiff,

v.

D-101-CR-2023-00040

HANNAH GUTIERREZ-REED,

Defendant.

MOTION CHALLENGING FIREARM ENHANCEMENT

Defendant Hannah Gutierrez-Reed, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Todd J. Bullion of Law Office of Todd J. Bullion, hereby moves this Court to not bind over the firearm enhancement listed in the government's criminal information filed in this matter, and in support states as follows:

Hannah Gutierrez-Reed adopts and incorporates the arguments made in Mr. Baldwin's filed motion on this issue. This motion involves the straightforward application of the Ex Post Facto doctrine found in the United States Constitution, New Mexico Constitutions, and relevant case law. In essence, the State is attempting to apply a retroactive and enhanced criminal penalty to prior alleged conduct, which violates the Ex Post Facto clause. This motion also challenges the applicability of the firearm enhancement statute that was actually in effect in 2021 to the facts alleged by the government in their filed charging documents.

**I. Utilizing the Current Version of NMSA section 31-18-16(A) violates the Ex
Post Facto Doctrine**

The firearm enhancement applicable at the time of the charged conduct, was the statute passed in 2020. That section then stated in NMSA section 31-18-16(A):

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, except that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this subsection may be increased by one year.

B. If the case is tried before a jury and if a prima facie case has been established showing that a firearm was brandished in the commission of the offense, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and if a prima facie case has been established showing that a firearm was brandished in the commission of the offense, the court shall decide the issue and shall make a separate finding of fact thereon.

C. 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.

That enhancement was replaced and broadened in May 2022, after the alleged conduct occurred in this case. It also added enhanced penalties and states:

A. When a separate finding of fact by the court or jury shows that a firearm was used in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4NMSA 1978 or a serious violent offense, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by one year, except that when the offender is a serious youthful offender or a youthful offender who received an adult sentence, the sentence imposed by this subsection may be increased by one year.

B. 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, except that when the offender is a serious youthful offender or a youthful offender that received an adult sentence, the sentence imposed by this subsection may be increased by one year.

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, except that when the offender is a serious youthful offender

or a youthful offender who received an adult sentence, the sentence imposed by this subsection may be increased by three years.

Thus, the 2022 amendment added a new penalty for discharging a firearm, punishing that by a term to five years imprisonment. The State has pled that enhanced penalty to the conduct here, seeking a five year term of imprisonment, which requires a jury finding that Ms. Gutierrez Reed “discharged” a firearm.

First, it is beyond well settled that the State cannot seek to apply a criminal law to conduct retroactively, as that would violate the Ex Post Facto clause. United States Constitution in Article 1, Section 9, Clause 3; New Mexico Constitution Art. II, § 19. An Ex Post Facto law is **a law that imposes criminal liability or increases criminal punishment retroactively**. 1. *See, e.g., Calder v. Bull*, 3 U.S. 386, 391 (1798); *Locke v. New Orleans*, 71 U.S. 172, 173 (1867); *State v. Ordonez*, 2012-NMSC-024, para. 17, 283 P.3d 282 (“statute that increases the punishment allowable for a previously committed offense violated the Ex Post Facto ban.”).

Second, it is not even alleged that Hannah had possession of the firearm at the time of the tragic, accidental shooting, or that she herself brandished or discharged it as those terms are defined in the statute. The State’s probable cause statement focuses on the fact that the gun was in Baldwin’s hands and not on Hannah’s person. The central point of the allegations made by the State against Hannah is that she was supposedly criminally negligent by virtue of not being present when the gun was discharged by Mr. Baldwin. See excerpts of the State’s Probable Cause Statement with pertinent language highlighted attached as Defendant’s **Exhibit A**.

It is uncontested that Ms. Gutierrez Reed was not inside the church at the time of the shooting and did not have possession of the firearm. *Id.* As a result, the State’s retroactive application of the enhanced five year penalty to Ms. Gutierrez Reed fails as a matter of well settled

law, dating back to the United States and New Mexico Constitutions, as interpreted by case law. Second, the application of the enhancement fails as a matter of fact, because Ms. Gutierrez Reed never discharged a firearm in connection with the tragic, accidental shooting.

II. The 2021 version of NMSA section 31-18-16 is not applicable to Hannah’s conduct as described by the government in their charging documents

The version of NMSA section 31-18-16 that was actually in effect on October 21, 2021 only allowed for the enhancement of a sentence when a gun was “brandished” in the commission of a non-capital crime. NMSA section 31-18-16(C) requires that the person charged with the firearm enhancement display or make a firearm known to another person while having a subjective intent to intimidate or injure a person. There is no fact allegation in the criminal information or probable cause statement that Hannah had the intent to intimidate or injure a person. The allegations made by the government are crystal clear that the shooting of Halyna Hutchins was a non-intentional accident. The District Attorney and Special Prosecutor have also publicly stated in an interview aired across the nation that the shooting was in fact an accident. Anousha Sakoui and Meg James, *Rust’ shooting case, New Mexico Prosecutors look to ‘get justice’ for Halyna Hutchins*, LA Times, (Feb. 10, 2023, 2:00 PM), <https://www.latimes.com/entertainment-arts/business/story/2023-01-19/santa-fe-district-attorney-wrestled-with-charges-alec-baldwin>.

When specifically asked by reporters “No one here intended to cause harm. So how do you square that with these charges?” Ms. Reeb replied, “We’re in no way saying this is an intentional homicide or act”. *Id.* Ms. Carmack-Altwhies responded, “Everyone agrees this was accidental, but it was recklessly accidental.” *Id.* There are significant constitutional and ethical concerns for a prosecutor to charge an enhancement when they make a public statement negating an essential element of that enhancement.

The definition of brandishing as stated in the version of the firearm statute actually in effect in October of 2021 also specifically requires that the gun is shown or made known with the aforementioned intent to intimidate or injure while the firearm is present on the person of the offending party. NMSA section 31-18-16(C). The government stated numerous times in its probable cause statement that the gun was not on Hannah's person at the time it was discharged. Exhibit A. There are no set of facts the government could allege at a prelim or any other hearing that would support enhancing Hannah's sentence under the version of NMSA section 31-18-16 in effect in 2021.

WHEREFORE, Hannah Gutierrez-Reed respectfully requests this Court to grant her motion and to refuse to bind over the firearm enhancement penalty. Ms. Gutierrez-Reed further requests that the firearm enhancement language be stricken from the criminal information for lack of any credible factual basis to proceed with that enhancement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent through the ESF system, which caused the following parties to be served by electronic means, as reflected on the Notice of Electronic Filing this 10th day of February, 2023, to the counsel listed below:

Mary Carmack-Altwhies
District Attorney

Andrea Reeb
Special Prosecutor

/s/ Todd J. Bullion
Todd J. Bullion

FILED
FIRST JUDICIAL
DISTRICT COURT

2023 JAN 31 PM 12:41

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff,

vs.

HANNAH GUTIERREZ,

Defendant.

No. D-0101-CR-202300 040
Judge: MARY MARLOWE SOMMER

CRIMINAL INFORMATION

The District Attorney of Santa Fe County, State of New Mexico, states that on or about the dates listed below, in said County and State, the above-named Defendant did commit the crimes of:

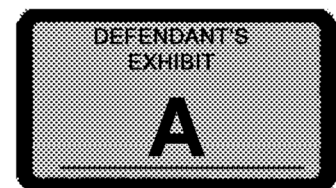
Count 1: **Involuntary Manslaughter**, (0007), on or about October 21, 2021, in Santa Fe County, New Mexico, the above-named defendant did cause the death of Halyna Hutchins, committed in the commission of an unlawful act, to wit: Negligent use of a Deadly Weapon contrary to 30-7-4(a)(3), and/or 30-7-4(a)(4) a fourth degree felony, contrary to NMSA 1978, Section 30-2-3(B) (1994).

IN THE ALTERNATIVE

Count 1: **Involuntary Manslaughter**, (0007), on or about October 21, 2021, in Santa Fe County, New Mexico, the above-named defendant did cause the death of Halyna Hutchins, committed in the commission of a lawful act, which might produce death in an unlawful manner or without due caution and circumspection, a fourth degree felony, contrary to NMSA 1978, Section 30-2-3(B) (1994). This offense shall be enhanced pursuant to the firearm enhancement statute, §31-18-16, NMSA 1978.

The State requests a felony first appearance be scheduled within thirty (30) days of this filing. The state requests a preliminary hearing be scheduled within sixty (60) days of the felony first appearance.

The names of the witnesses upon whose testimony this information is based is contained within a Witness list filed contemporaneously with this Information.



evidence, it was learned that Halyna Hutchins was the Director of Photography for the film, and Joel Souza was the Director/Writer for the film.

Information and evidence obtained showed that BALDWIN was seated in a pew facing in a northerly direction, towards the front of the church. In front of him was Halyna Hutchins and Joel Souza, and a camera operator, along with other crew (i.e. sound, script, costume, etc.). Not present among all the ancillary crew was REED in direct violation of established safety policy and procedure utilized on all film sets when firearms are being used. BALDWIN was wearing a shoulder holster, which was securing/holding a .45 long colt caliber, six shot revolver. BALDWIN was practicing drawing and pointing the weapon for the scene with guidance and instruction from Halyna Hutchins and Joel Souza.

The set-up was to be a close-up on BALDWIN and the firearm, as he drew the weapon and pointed it. Halyna Hutchins and Joel Souza were viewing the scene on a monitor attached to the camera. BALDWIN drew the revolver from the holster, pointed it at Halyna Hutchins and fired the weapon. When reviewing the script and witness interviews, for this scene and close-up shot, evidence indicates the scene did not require the weapon to be fired with blank rounds. Only dummy rounds (rounds that are inert but cosmetically appear to be real) were to be used. It was also determined by consultation with expert armorers that in a rehearsal, a plastic gun or replica gun should be used as no firing of blanks is required.

At approximately 1:48 PM, the shooting was reported to Santa Fe County Regional Emergency Communications Center (RECC) via 911. This resulted in the response of Fire, Emergency Medical, and Santa Fe County Sheriff's Office personnel. This further resulted in a Case Number/CAD Incident number being generated, 2021-007949. The Santa Fe County Sheriff's Office investigated this shooting under this Case Number, as a "Death Investigation". The response of emergency personnel resulted in Joel Souza being transported by ambulance to St. Vincent Regional Medical Center located at 455 St. Michael's Drive, within the city limits of Santa Fe, NM. Halyna Hutchins was transported from the scene by air ambulance/helicopter to the Level 1 trauma center at the University of New Mexico Hospital located in Bernalillo County, Albuquerque, NM.

Halyna Hutchins was pronounced deceased at approximately 3:37 PM by attending medical personnel. Joel Souza was treated and released, but not before a projectile was removed from his back. The projectile appeared to be a lead projectile of the type and kind found in 'live' ammunition. This item was secured and turned over to the Santa Fe County Sheriff's Department.

Evidence and analysis showed that the recovered projectile had first struck and then passed entirely through Halyna Hutchins (NM Office of the Medical Investigator reports/finding) and then struck Joel Souza. The projectile penetrated through the front of Joel Souza's right shoulder and became lodged under the skin on his back. The Office of the Medical Examiner, State of New Mexico listed Halyna Hutchins cause of death preliminarily as "Gunshot wound of the chest" after conducting an autopsy on October 22, 2021.

The following additional information and evidence is provided in further support of probable cause of the enumerated crime(s) having been committed by GUTIERREZ-REED:

FIREARM, AMMUNITION AND GUTIERREZ-REED IN HER ROLE AS ARMORER

Industry standards, best practices, common practices, historical practices, policies and/or procedures, and union guided policies and/or procedures require and/or mandate certain members of a filming crew have, assume or are assigned certain obligations and responsibilities. Industry expert(s) and/or armorer(s) were consulted for information and evidence in this realm. GUTIERREZ-REED was the designated and hired armorer for this production. As such, all safety and training considerations involving firearm(s) were the responsibility of GUTIERREZ-REED to make available and present to production. All on-set protocols when firearm(s) are present were the responsibility of GUTIERREZ-REED to manage, be present and enforce. Industry standard(s) require that movie set armorers be responsible for all firearm safety in training, handling, discharging, loading/unloading, best practices and best safety practices as set forth in safety material and industry established protocol.

Based on her position, GUTIERREZ-REED, through act(s) and/or omission(s), contributed to or failed to mitigate or address multiple significant safety violations, safety issues, protocol violation(s) and/or concerns that resulted in multiple noted instances of recklessness leading up to, contributing to, and causing the fatal shooting.

Statements and evidence show BALDWIN was not present for required firearms training prior to the commencement of filming. Statements, depositions from OSHA, and evidence show BALDWIN was provided only minimal training on firearms. REED knew BALDWIN required more training. In interviews and depositions from OSHA, REED stated she felt this training was very important for BALDWIN in his character in Rust. During what was supposed to be an over one-hour training, BALDWIN was distracted and consistently talking on his cell phone to his family. The actual training session only consisted of approximately 30 minutes due to BALDWIN'S distractions. This was a primary responsibility of GUTIERREZ-REED, wherein she failed to meet industry standards and common safety practices in conducting the proper training with the lead actor. REED stated in her deposition, this training was essential and could have prevented the fatal shooting.

Photo and video evidence from inside the church, on the day of the shooting, have been obtained from an individual that was inside the church, during the rehearsal and moments before the shooting. The photos and videos depict the above-described actions of BALDWIN prior to the shooting (practicing drawing and pointing the weapon). The photos and videos clearly show BALDWIN, multiple times, with his finger inside of the trigger guard and on the trigger, while manipulating the hammer and while drawing, pointing and holstering the revolver. GUTIERREZ-REED was reckless in her responsibility to ensure set safety with the firearm. She failed to correct BALDWIN from committing the dangerous and reckless safety violations by pointing the weapon at/towards people and by having his finger on the trigger. Evidence shows that GUTIERREZ-REED did not stay on set with the firearm as required by common practice, safety protocol(s) and industry standard(s). Additionally, REED allowed 1st assistant director David Halls (hereinafter HALLS) to take possession of the firearm unsupervised in direct violation of safety standards and procedures. Her absence from the set allowed the reckless

discharge on the set, contrary to common safety protocols, procedures, and industry standards. This too contributed to the reckless climate documented on this set/production.

On another separate occasion REED loaded blanks into a lever action rifle and allowed a stunt performer to take possession, unsupervised, in direct violation of some of the most stringent safety protocols in film. The stunt performer returned to the "holding tent" where he allowed an ND (negligent discharge) to occur. REED in this instance alone violated multiple safety protocol contributing to and resulting in a serious safety issue.

Through evidence and interviews, these significant safety violations were deemed reckless and negligent by the investigation as there was no indication(s) or evidence that the firearm(s) in question malfunctioned at any time; rather there is evidence the weapon(s) fired because of mishandling/misuse by those handling the firearm, i.e. pressing the trigger when it should not be. As armorer, GUTIERREZ-REED was ultimately responsible for correcting or mitigating these and any safety violations from cast/crew. In this circumstance it is common practice (an expected) for any actor handling or firing a weapon to check for safety. The armorer's role is to provide that proper safe handling and management in order for them to do so. REED not only failed in this regard but was not even present. This ultimately was exaggerated by the weapon being used by BALDWIN in an unsafe manner in close proximity to cast and crew ultimately pointing the weapon, in violation of the most cross-industry established safety rule, at Halyna and firing. All these actions knowingly without an armorer present against industry safety standards, practice and Union regulations.

Evidence and statements also show that HALLS, by virtue of his position, is the first point of contact for an armorer when they bring a firearm on set, and is the first person required to conduct a safety check with the armorer and weapon. HALLS is further required to announce to crew when a firearm is on set, and whether it is 'cold' or if the weapon will be fired in the scene (i.e. announce 'fire in the hole' or other common phrase to put the crew on notice for shooting/loud noise/hearing protection, etc.).

HALLS, additionally, by virtue of his position and industry standards and practices, is prohibited and/or strictly discouraged from handling any of the firearms on a set. As such, industry standards, policies and practices call for the armorer to be on set and to stay on set any time a firearm is on set. GUTIERREZ-REED allowed the reckless practice of allowing HALLS to handle the weapon, on the day of the fatal shooting.

Prior to lunch, statements and evidence show that HALLS requested BALDWIN'S firearm be prepped and brought to the set by the armorer GUTIERREZ-REED, for rehearsal/practice purposes. GUTIERREZ-REED states that she loaded the firearm with dummy rounds, performed a safety check with HALLS and the firearm, and then HALLS took possession of the firearm from GUTIERREZ-REED. GUTIERREZ-REED departed the church. GUTIERREZ-REED leaving the set and HALLS handling the firearm are considered very reckless actions according to industry standards, expectations, and common firearm safety protocols and considerations. However, there are contradictory statements that REED brought an empty gun to HALLS and then at some point loaded it with dummies while in the church. REED then shows HALLS the gun again, only opening it and not taking out the bullets. REED then leaves the set.

Regardless, REED had a duty to show whomever she handed the gun to, whether HALLS or BALDWIN, a safe gun by taking out each bullet and showing them each one was a dummy. Yet, she failed to do this and did not assert herself when it didn't happen. REED also had a duty to stay with the weapon.

Further evidence and statements show that when the crew broke for lunch, firearms, including BALDWIN'S, were secured in the prop truck safe. Outside of the church was a cart used by the armorer, GUTIERREZ-REED (and the prop master, contrary to standard safety protocols), that contained leather gear/rigs like holsters and belts, and ammunition. Evidence clearly indicates this cart and associated items was not secured during the break and was not in visual range of GUTIERREZ-REED or Sarah Zachery for safety and security nor was a "fire-watch" in place at the cart. The unsecured cart with equipment, ammunition, and firearms is considered reckless by industry standards and by common firearm safety standards and protocol. REED should have made sure all ammunition was always secured.

Upon returning from lunch, evidence and statements show that GUTIERREZ-REED retrieved BALDWIN'S revolver but didn't empty the weapon and perform a safety check. Additionally, GUTIERREZ-REED again is asked and complied with HALLS by handing him the firearm once inside the church. Evidence and statements also indicated that an 'after lunch' safety check of the firearm between GUTIERREZ-REED and HALLS or between GUTIERREZ-REED and BALDWIN did not occur. GUTIERREZ-REED again departed the church. This 'after lunch' sequence of events is documented to have had no less than four (4) reckless violations of industry standards, safety, protocol, best practices, and common firearm safety protocols in a very short, compressed period of time by REED, HALLS and BALDWIN.

On the day of the shooting alone, evidence shows that many acts or omissions of recklessness occurred in the short time prior to lunch and the time of the shooting, and this does not account for the reckless handling of the firearm by BALDWIN. GUTIERREZ-REED directly contributed and/or failed to mitigate numerous reckless and dangerous actions in the course of a very short time period.

Evidence and statements indicate that Locations Dept "props" and the armorer were sharing a vehicle, and its associated storage space. It further indicates that while firearms may have indeed been controlled, ammunition and associated boxes were not securely stored. This is a reckless violation of common safety practice(s) for armorers, of which GUTIERREZ-REED failed to act to address this recklessness. This created a disorganized, chaotic environment which REED did not address and contributed to resulting in further violations of common safety practices and standards.

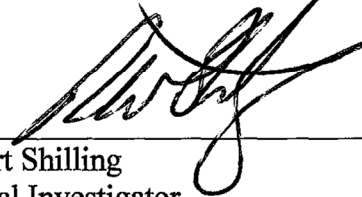
Finally, industry standards, protocols, and common firearm safety procedures on movie sets require the armorer, after conducting a safety check with the 1st assistant director, to conduct a second safety check with the actor to be handling the firearm (and others on set). In this instance, it would have required completely emptying the firearm, shaking each round to ensure it is a dummy round. This safety check is then conducted with the actor as well. This reckless violation of standards and firearm safety occurred two (2) times leading up to the shooting, and

GUTIERREZ-REED failed to act to mitigate or correct the reckless safety violations. Directly resulting in HUTCHINS death.

Evidence exists to clearly show that On October 21, 2021, Halyna Hutchins was killed when BALDWIN fired a firearm pointed at her. The evidence and statements documented in this affidavit confirm many instances of extremely reckless acts or reckless failures to act REED in a 10-day period. Evidence and statements clearly indicate that GUTIERREZ-REED loaded the firearm, provided it to the set, secured it for lunch, and then again provided it to the set for use. Evidence clearly shows that none of the incidents or issues were addressed by GUTIERREZ-REED in her position as armorer to mitigate future occurrences of recklessness, correct reckless behavior, correct training deficiencies, etc.

REED's deviation from known standards, practice and protocol directly caused the fatal death of Hutchins. By not insisting BALDWIN had the proper training, not checking the rounds she was loading into the firearms, not showing HALLS or BALDWIN each bullet before handing them the firearm, allowing live rounds on scene, not staying in the church with the firearm, allowing BALDWIN to point the firearm at Hutchins, not voicing her concerns to management of her double duties as armorer and props assistant, allowing ammunition to not be secured, not making sure a rubber or replica gun was used in a rehearsal scene, and allowing BALDWIN to handle a firearm in a negligent manner, REED acted with willful disregard for the safety of others and in a manner which endangered other people, specifically HUTCHINS and SOUZA. REED clearly should have known the danger of her actions which led to the death of HUTCHINS.

-Probable cause exists that GUTIERREZ-REED committed involuntary manslaughter contrary to and defined in NMSA 30-2-3 "Manslaughter"...in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection or during the unlawful act not amounting to a felony, to wit: Negligent use of a deadly weapon.



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