

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

STATE OF NEW MEXICO,

Plaintiff,

v.

D-101-CR-2023-00040  
D-101-CR-2023-00039

HANNAH GUTIERREZ-REED,  
ALEXANDER RAE BALDWIN, III,

Defendants.

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**DEFENDANT HANNAH GUTIERREZ-REED'S BRIEF ADDRESSING DISTRICT  
ATTORNEY'S POWER TO CONTINUE AS CO-PROSECUTOR AFTER  
APPOINTMENT OF SPECIAL PROSECUTOR**

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Defendant Hannah Gutierrez-Reed, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Todd J. Bullion of Bullion Law Office, hereby submits her Brief Addressing this Court's directive to brief whether the District Attorney is authorized to continue as co-prosecutor after appointment of a Special Prosecutor and states:

**I. Background**

In a letter to counsel dated March 20, 2023, the Court informed the parties that the State had requested that the Court swear in a new Special Prosecutor. The Court stated it had reviewed NMSA 1978, Section 36-1-23.1, *State v. Surratt*, 2016-NMCA-004, 363 P.3d 1204, and *State v. Hollenbeck*, 1991-NMCA-060, 112 N.M. 275, noting that "It seems that once a special prosecutor is appointed under the statute for 'good cause,' the special prosecutor steps into and takes over the prosecution, thereby fulfilling the statute's purpose. Therefore, before a new special prosecutor is

appointed and takes an oath, the Court requests that the parties submit limited briefing, not to exceed 10 pages, to address this issue.”

Consistent with the Court’s observation, New Mexico law compels that once a Special Prosecutor is appointed under Section 36-1-23.1, that prosecutor takes over the case and stands in the shoes of the District Attorney, who is no longer authorized to continue as co-counsel. Moreover, the record in this case demonstrates that the State cannot establish good cause for appointing a Special Prosecution and, therefore, the State’s request to swear in a new Special Prosecutor should be denied.

## **II. Law**

New Mexico’s special prosecutor statute requires the State to demonstrate that it “cannot” prosecute the case for “ethical reasons or other good cause” before it may appoint a Special Prosecutor. Specifically, NMSA 1978, Section 36-1-23.1 provides that:

Each district attorney may, when he cannot prosecute a case for ethical reasons or other good cause, appoint a practicing member of the bar of this state to act as special assistant district attorney. Any person so appointed shall have authority to act only in the specific case or matter for which the appointment was made. An appointment and oath shall be required of special assistant district attorneys in substantially the same form as that required for assistant district attorneys in Section 36-1-2 NMSA 1978.

As in any case of statutory interpretation, the analysis begins with the plain language. Here, the statute’s plain language states that the district attorney may appoint a special prosecutor only “when [the district attorney] *cannot* prosecute a case for ethical reasons or other good cause.” (emphasis added). The legislature could have enacted a statute saying the appointment is allowed when the district attorney “cannot prosecute the case without assistance, for ethical reasons or good cause.” Or the statute could have contained additional language stating that an appointment is permitted in two circumstances, when the district attorney “cannot” prosecute the case, as the

statute reads now, or when the district attorney “cannot prosecute the case without co-counsel.” But the statute contains *none* of these terms. It states only that an appointment is permitted when the district attorney cannot prosecute the case—which, by its plain terms, means that the district attorney is not permitted to co-counsel with the special prosecutor without undermining the statutory authority for the appointment in the first place.

The existing caselaw is consistent with this interpretation. For example, in *State v. Surratt*, 2016-NMCA-004, 363 P.3d 1204, the New Mexico Court of Appeals held that “a properly appointed special prosecutor is given all the authority and duties of the appointing district attorney to prosecute the case for which that special prosecutor was appointed, including the authority to name another special prosecutor if unable to proceed for an ethical reason or other good cause.” The *Surratt* Court dealt with a conflict appointment, but its language was broad and consistent with the rule that once a special prosecutor is appointed, that prosecutor takes over prosecution of the case. In relevant passages, the Court stated:

Pursuant to the authority granted by the New Mexico Constitution, the Legislature has determined various responsibilities of the district attorney, as well as circumstances in which the district attorney may be succeeded in the exercise of these responsibilities. [Listing numerous instances in which others may exercise the powers of the district attorney when the district attorney is *prohibited* from doing so in any capacity, such as ethical reasons, conflicts, the appearance of impropriety.] . . . Many other jurisdictions have decided that a special prosecutor steps into the shoes of the district attorney and has the same power and authority in relation to the specific case for which that special prosecutor was appointed as the district attorney would have if not otherwise conflicted in the case. *See, e.g., Petition of Padget*, 678 P.2d 870, 874 (Wyo.1984) (explaining that the state statute permitting a court to direct or permit any member of the bar to act in the place of a district attorney where a disqualifying conflict of interest arises allows that attorney to assume the same duties and responsibilities as those of the district attorney); *People v. Hastings*, 903 P.2d 23, 25 (Colo.App.1994) (“When a special prosecutor is appointed, that person becomes the district attorney for that particular case, exercising plenary power.”), *as modified on denial of reh'g* (Feb. 16, 1995). . . . *See People v. Dellavalle*, 259 A.D.2d 773, 775, 687 N.Y.S.2d 199 (App.Div.1999) (“[T]he appointment of a Special Prosecutor to replace the District Attorney in a particular matter terminates the latter’s authority with respect to any further proceedings in the case....”).

The import of this ruling is clear: the Special Prosecutor statute is triggered only when the district attorney *cannot* act in the case. Obviously, the district attorney has no statutory authority to appoint a special prosecutor on the basis that she “cannot” handle the case when she is seeking to co-counsel with the special prosecutor. The request to co-counsel undermines the statutory basis for the appointment.

An earlier opinion, *State v. Hollenbeck*, 1991-NMCA-060, 112 N.M. 275, also made clear that the district attorney must be unable to prosecute the case before a special prosecutor may be appointed. In that case, the State admitted that there was “no reason the district attorney . . . could not have prosecuted the defendant.” The Court therefore found that the district attorney had no authority to appoint the special prosecutor and, critically, reversed the defendant’s conviction because the district attorney did not have the authority to appoint the special prosecutor who had handled the case.<sup>1</sup>

In combination, these authorities stand for two relevant principles: first, a district attorney is authorized to appoint a special prosecutor only when the district attorney *cannot* prosecute a case for ethical reasons (such as conflicts) or other “good cause”; and second, if the appointment is properly made, and the transfer of the district attorney’s power to prosecute is accomplished, then the district attorney cannot co-counsel with the special prosecutor because the entire statutory basis for the appointment is that the district attorney *cannot* handle the case in the first place.

### **III. Analysis**

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<sup>1</sup>In *Hollenbeck*, in 1991 in *dicta*, the Court wrote that the failed appointment there may have been fine had the statute been complied with as the special prosecutor would have then remained under the supervisory control of the district attorney. That statement can be reconciled with the Court’s pronouncements in *Surratt* because what the Court is saying is that the power to prosecute must be properly delegated to a special prosecutor by the district attorney through the statutory procedures. Once that happens, the special prosecutor then takes over the case and stands in the shoes of the district attorney.

The State has fundamentally misunderstood the language and purpose of the statute. The statute is not designed to give district attorneys a taxpayer funded supplemental “war chest” to prosecute cases involving “high profile” actors or individuals, adding firepower but allowing the district attorney and her assistants to remain on the case. Instead, the statute is expressly designed to authorize the appointment of a special prosecutor to *take over* a case where the district attorney *cannot* prosecute for ethical reasons or other good cause. Here, there is neither.

*First*, the law is clear that the district attorney cannot serve as co-counsel with a special prosecutor because the district attorney is not authorized to appoint a special prosecutor unless she “cannot” handle the case. The district attorney cannot have it both ways: she can’t argue that she “cannot” prosecute the case, therefore triggering the statutory right to appoint a special prosecutor, and then assert the contradictory position that she *can* prosecute the case as co-counsel with the special prosecutor.

*Second*, State has not identified any ethical conflict that would prevent the district attorney from handling the case. Therefore, the State has not demonstrated authority to appoint a special prosecutor on the basis that it “cannot prosecute [the] case for ethical reasons.”

*Third*, the State has not demonstrated that it “cannot prosecute [the] case for . . . other good cause.” Although *State v. Hollenbeck*, 1991-NMCA-060, recognized that “[t]he reason that the district attorney ‘cannot prosecute’ a case need not be a legal or ethical reason; it could be a matter of lack of resources,” the district attorney here has not demonstrated that it “cannot” prosecute the case because of a “lack of resources.” To the contrary, just as the district attorney admitted in *Hollenbeck*, Ms. Carmack-Altweis has effectively conceded that there is no reason she’s unable to handle the prosecutions against Hannah Gutierrez Reed and Alec Baldwin. Simply put, if Ms. Carmack-Altweis is willing and able to co-counsel on this case, as she has admitted she can and

wants to do, then she is unable to demonstrate she “cannot” handle the case—as is required under the statute to trigger her right to appoint a special prosecutor.

Moreover, as a practical matter, Ms. Carmack-Altweis and the internal team from her office have proven that they *can* prosecute the case, because they have participated fully in all aspects of the case to date. For example, among other things, she has: (1) made numerous press appearances commenting on her belief in the guilt of those charged, (2) signed all pleadings, (3) made court appearances, including without Andrea Reeb present, (4) argued the detention motion in Ms. Gutierrez-Reed’s case, (5) co-counseled with her deputy district attorney in the proceedings, (6) engaged in significant email exchanges with counsel about discovery and inspections of evidence, (7) produced discovery in this case and coordinated with defense counsel regarding the transfer of files, (8) negotiated with defense counsel regarding defendants’ terms of release, and (9) represented to defendants’ counsel that she personally prepared the special prosecutor briefing herself, without Reeb’s assistance. The fact that the district attorney would like additional assistance in the case, or thinks it would be helpful, does not meet the high statutory bar of proving she “cannot” prosecute the case.

It also bears mentioning that other than the fact that high-profile actor Alec Baldwin is named as a defendant in this case, this is an involuntary manslaughter prosecution, which the district attorney’s office routinely handles. While it is witness intensive, the legal standards are the same for any other involuntary manslaughter case. It is fundamentally unfair to Ms. Gutierrez-Reed, a 25-year old young woman just beginning her career, to face a situation where the district attorney’s office is allowed to augment its staff and resources with taxpayer money, allowing the

district attorney to continue in the case and throw all of the weight of the State and more against her, merely because this is “high profile” and has captured the attention of the national press.<sup>2</sup>

#### **IV. Conclusion**

For the above reasons, the State is prohibited from serving as co-counsel in this case with a special prosecutor. Furthermore, the record demonstrates conclusively that the State has failed to demonstrate any statutory authority to appoint a special prosecutor. In the event such a special prosecutor is appointed, over Ms. Gutierrez-Reed’s objections, the prosecution will be unlawful under the holding set forth in *State v. Hollenbeck*. The Court should therefore deny the State’s request to appoint a special prosecutor or, at a minimum, prohibit the district attorney or anyone from her office from serving as co-counsel with a special prosecutor.

Respectfully submitted,

/s/ Jason Bowles

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<sup>2</sup> This has also unearthed a potentially troubling issue involving prior appointment of a special prosecutor, referenced in Mr. Baldwin’s most recent filing before the Court. An email from June 9, 2022, has surfaced in which the prior special prosecutor, brought on in June 2022, stated that the district attorney’s office should announce her involvement as it may help her political campaign for state representative – adding an “lol” at the end of the email. The district attorney immediately responded, saying she would announce Reeb as requested, and some months after did announce the special prosecutor’s involvement. Reeb won her race. This points to the fact that this case is being prosecuted because of its high-profile nature alone, which, among other things, ignores the original purpose of the special prosecutor appointment statute – allowing appointment for ethical reasons or reasons of “good cause” and inability to prosecute due to lack of resources.

**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 24<sup>th</sup> day of March, 2023, to the counsel listed below:

Mary Carmack-Altwhies  
District Attorney

/s/ Jason Bowles  
Jason Bowles  
Bowles Law Firm