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Mayra Mendoza-Gutierrez

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.

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

In the Response, the special prosecutors admit that the distribution of Ms. Gutierrez Reed's attorney client information to a chief third-party witness is a serious violation. In fact, Ms. Morrissey in a previous hearing before this Court conceded that she takes the attorney client privilege seriously and that the information and everything flowing from the illegal distribution should be suppressed. Now, after making that concession that the State violated Ms. Gutierrez Reed's constitutional rights, the special prosecutor belatedly attempts to blame defense counsel and assert waiver for the first time. This after the fact, Hail Mary attempt is not persuasive and has no support in New Mexico case law. In doing so, the special prosecutor also further displays her personal vindictiveness and animus to counsel and Ms. Gutierrez Reed by her continuing unprofessional, personal attacks, to try and divert the Court's attention to the seriousness of the violation.

The case law that examines attorney client violations by the government almost exclusively involves the government or an agent of the government accidentally downloading or accessing

attorney client communications. In those cases, the usual remedy is recusal of the prosecution team. Here, we have a novel and more serious situation whereby the prosecution shared a mass of information with a chief third-party witness, including the defendant's attorney client communications, without taking any steps whatsoever to check or screen the material requested by Mr. Kenny through an IPRA request for privileged materials which are by law not subject to disclosure. The IPRA statute specifically exempts attorney client communications from IPRA – meaning the records cannot be disclosed pursuant to IPRA. *Martinez v. Padilla*, No. CV 19-889 JCH/GJF, 2020 WL 5766833, at *2 (D.N.M. Sept. 28, 2020)("Under New Mexico's Inspection of Public Records Act ("IPRA"), N.M. Stat. § 14-2-1, every person has a right to inspect the public records of the state of New Mexico and its agencies. Several types of government records, however, may not be inspected, including "letters or memoranda that are *matters of opinion* in personnel files." § 14-2-1(C) (emphasis added)").

This case is further uniquely troubling because prosecutors and agents never share defendants' internal information and communications with key witnesses, because that corrupts the fact-finding process and allows witnesses to reshape their testimony around communications they have received. This is further prohibited by the IPRA statute, cited below, which mandates that attorney client materials are excluded from production to requestors. This special prosecutor, instead of utilizing a IPRA unit, like most agencies do, and are trained in this process, just unilaterally sent 18,000 pages to a chief third party witness, without doing any kind of attorney client communication's check, or IPRA compliance check.

On the timeline and scope for the second report generation of Ms. Gutierrez Reed's phone and illegal disclosure of her attorney client communications, Ms. Morrisey has also misrepresented to the Court. The State claims that *prior* to requesting a second report be done on the phone data

and releasing Ms. Gutierrez Reed's attorney client communications to a third-party witness, that it reviewed emails from Sheriff's Investigator Hancock, on the scope of the consent search of the phone.

"The second report was requested after it became apparent that there were many messages from the initial report during the time that Gutierrez was working on the set of Rust. Prior to requesting a second and more complete report undersigned counsel reviewed the consent form signed by Mr. Bowles and Ms. Gutierrez and she also reviewed all email exchanges between Mr. Bowles and Detective Hancock. Finding that there appeared to be no limitations, a second report was requested…"

State's Response to Defendant's Motion in D-101-CR-2023-00418, filed on 1/29/24 at page 18.

Yet, this doesn't add up on the timeline. Emails reflect that the State released the attorney client communications from Ms. Gutierrez Reed's phone to the third-party witness (Seth Kenney) on July 12, 2023. The emails from Investigator Hancock are date stamped (attached as Exhibit 4 to the State's Response filed 1/29/2024 in D-101-CR-2023-00418) and were not sent by Deputy Hancock to Ms. Morrisey until July 18, 2023.

STATE'S EXHIBIT 4

From: Alexandria J. Hancock ajhancock@santafecountynm.gov
Subject: FW: Phone Records
Date: July 18, 2023 at 11:18 AM
To: ktm@morrisseylewis.com, Jason J. Lewis jl@jjllaw.com

Here is the email thread between Jason and I.

I will not be able to set something up with Emery until the beginning of August, I'm on pre-approved leave and have a training to attend next week, as well as instructing new hires.

Detective Alexandria Hancock
Violent Crimes Division
Office (505)986-2486
Cell (505)490-1023

Thus, Ms. Morrisey could not have read the emails between Detective Hancock and Mr. Bowles before releasing all the attorney client communications to the witness on July 12, 2023. In short, the State did not make any efforts to learn of any limitations on the search parameters by contacting Investigator Hancock, until 6 days *after* she had already released the entirety of all the text messages to the third-party witness. The State's attempts to persuade the Court otherwise by obscuring the timeline are false and misleading.

Moreover, counsel's belated assertions that she was surprised that there were attorney client communications in the second phone download are not believable as the State also admits in July emails that in the first much more limited search extraction of 1000 pages, Deputy Hancock excluded attorney client communications. Email dated July 28, 2023, sent from Ms. Morrisey to Mr. Bowles, "I believe no one saw the AC messages when the previous report was generated. The raw data went to RCFL and a report was generated that did not include the messages (presumably because Hancock told RCFL to exclude them)." Attached as Exhibit A.

The State's counsel being experienced, it is also not believable that counsel would just assume attorney client communications were not present and just fire them all off to a third-party witness before taking any, even minimal, steps to verify. This misrepresentation is serious as it is designed to mislead the Court that the State took some steps to determine whether there were any parameters on the search, when it took no steps to mitigate concerns that attorney client communications would be contained within the search of Ms. Gutierrez Reed's entire phone. It also exposes another truth: counsel for the State knows what she did was wrong, has admitted that, and now is trying to spin things in every way possible to mitigate her actions or to blame defense counsel.[1]

Furthermore Ms. Morrisey providing 18,000 pages of a cell phone extraction pursuant to a public records request without first reviewing its contents violates new Mexico's IPRA statute which forbids the disclosure of certain types of information, including information which is protected by a privilege. NMSA 14-2-1(F)(forbidding the disclosure of attorney-client communications in response to an IPRA request); see also *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 38, 415 P.3d 505, 51 ("**IPRA explicitly recognizes that there are some categories of public records that should be protected from disclosure**. In Section 14-2-1, after the broad policy statement that "[e]very person has a right to inspect public records of this state," IPRA specifically lists a number of documents where policy considerations in confidentiality override public disclosure, including physical and mental health records, reference letters, opinions about students or employees, confidential law enforcement records, materials donated to schools under

[1] The special prosecutor admitted in a hearing before Judge Marlowe Sommer, in the involuntary manslaughter case, that the attorney client texts should not have been disclosed and that they should be suppressed as well as anything flowing from their disclosure. The State's belated attempts now to blame defense counsel resemble a robber saying, well they let us into the bank so it's their fault that we stole the money.

confidentiality limitations, trade secrets, **attorney-client communications**, confidential business plans of hospitals, and terrorist attack defense plans. Section 14-2-1(A)(1)-(7)").

At page 3 of the State's Response they claim that the IPRA submitted by Mr. Kenny by email directly to Ms. Morrisey that the 18,000 pages of records, "fell into the parameters of the request and was consequently provided as required by law". The government was not required to provide privileged materials to Mr. Kenney; they were in fact exempt from disclosure under IPRA. *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 38. Mr. Kenny made this request to Ms. Morrisey on the same day Ms. Morrisey contacted Mr. Kenny to let him know that Ms. Morrisey had the entire contents of Defendant's phone in her possession. Ms. Morrisey responded to Mr. Kenny's IPRA request the same day without performing any screening for privileged materials. Defendant's Response to Defendant's Motion in D-101-CR-2023-00418 filed on 1/29/24 at pages 18 and 19:

> there appeared to be no limitations, a second report was requested. When the second report was provided by the cellular experts, undersigned counsel did a cursory review of the report and noticed text communications pertaining to Seth Kenney.

> Undersigned counsel contacted Mr. Kenney and asked him a few limited questions related to the texts in the report that related to him. Due to this conversation, Mr. Kenney became aware that a second cellular report was generated, and he submitted an IPRA request to counsel for the report. Mr. Kenney previously obtained a copy of the first cellular extraction report in 2022 when the Sheriff's Department made all discovery/evidence available to the public. It never occurred to undersigned counsel that an experienced attorney would engage in substantive and material communications with their client, retain those communications, agree to an extraction that would include those communications and never indicate in writing that the communications exist and need to be deleted from any extraction reports. The conduct that Mr. Bowles engaged in is unthinkable. Without realizing that attorney-client communications were included in the report, the report was sent to Mr. Kenney pursuant to his IPRA request.

IPRA does not work for the government as a shield that they can use to excuse their violations of the Defendant's right to counsel. *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 38. Regardless of whether it had not occurred to the special prosecutor that a screening should occur for 1) privileged materials that would taint her investigation and prosecution of this case and/or 2) that IPRA does not permit and does not include the production of several types of information, one of his is attorney client communications; a screening should have been done and was not done. As a result of the special prosecutor's failure to engage in any screening the Defendant's right to counsel has been violated and she now cannot have a fair trial.

Regarding Ms. Morrisey's claim that counsel was aware that there was only one "extraction" of Ms. Gutierrez Reed's phone, counsel was relying on Ms. Morrisey's email of July 25, 2023, in which she described in her own words that there were two extractions of Ms. Gutierrez Reed's phone. Three days later, counsel then stated in email that there was just one extraction.

Thus, the initial confusion over how many extractions were performed came from State's counsel. Regardless of the terminology, there was a second "report" in which the State obtained 18,000 pages from Ms. Gutierrez Reed's phone, massively eclipsing the report that Investigator Hancock had previously requested, and which contained closer to 1000 pages and did not contain the attorney client communications. If Detective Hancock in her professionalism knew to not include attorney client communications in a report from Ms. Gutierrez Reed's phone, how is it credible that counsel for the State is now playing naïve on that point?

That Detective Hancock was aware of parameters placed on the search through communications with defense counsel is evident by the first report that Hancock obtained from RCFL from Ms. Gutierrez Reed's phone data. That first report *excluded* attorney client communications and was limited to around 1000 pages. Aside from the special prosecutor's experience, that should have tipped her off that there were limitations on the initial search. Indeed, it is a matter of general knowledge amongst experienced attorneys and prosecutors that the defendant's attorney client communications are not something that the government gets to see, let alone turn over to third party witnesses. It's inconceivable that any prosecutor with any level of experience would think otherwise. The whole bedrock concept of the attorney client privilege is that defendants and clients must feel free to communicate with their counsel, and not hold back information on the idea that the government may eventually see it.

Detective Hancock told defense counsel that she would obtain a warrant for Ms. Gutierrez Reed's phone unless Ms. Gutierrez Reed wanted to cooperate. She chose to cooperate and turn over her phone but only after counsel had received assurances from Detective Hancock that the search would be limited to Rust related matters and would not involve private matters of attorney client communications. In fact, when the attorney client matter was raised the response from

Detective Hancock was along the lines of, of course we would not obtain or review attorney client communications. Detective Hancock honored that understanding and it was only the cavalier approach by Ms. Morrisey to obtain the second massive report without checking with Hancock, and to disclose everything under IPRA to a *chief third-party witness*, without doing any sort of IPRA review either, that this became a problem of constitutional magnitude.

Moreover, the special prosecutor's arguments on waiver must fail. Waiver in a criminal case of an important constitutional right must be done by a *client,* and the waiver must be express, knowing and voluntary. A waiver of such an important constitutional right is always occasioned by an *express* writing, signed by the client. This is true whether its acknowledgement and waiver of Miranda warnings, waiver of important hearings in Court, or other important matters. Here, neither counsel nor Ms. Gutierrez Reed *ever* waived confidentiality of her attorney client communications, and that was made clear. That, again, was understood by the State through the lead investigator, honored by the lead investigator, and only breached when the new special prosecutors failed to take any steps at all to learn the parameters on the search, and recklessly sent the communications to a third-party witness. Indeed, it should have been abundantly clear to any prosecutor that downloads from a phone must be screened to ensure there are no protected or confidential communications, especially here where that process had to be done for an IPRA disclosure as well. This belated waiver argument is a last-ditch effort to foist blame somewhere else, and to avoid the natural implications of the State's unlawful acquisition and dissemination of attorney client communications.

A consent to search in New Mexico allows for one and only one search. *State v. Flores*, 1996-NMCA-059, ¶ 23, 122 N.M. 84, 91, 920 P.2d 1038, 1045 ("Discussing common limitations on the scope of consensual searches, LaFave notes, "As a general rule, it would seem that a consent

to search may be said to have been given on the understanding that the search will be conducted forthwith and that only a single search will be made""(citing 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.10(f), at 358 (1984)). In *Flores* the Court of Appeals found that when a Defendant provided consent to search his vehicle on the side of the road and police performed a roadside search, and then towed the vehicle away and performed a second search in which they partially dissembled the vehicle was outside the scope of consent actually given. *Id.* at ¶ 24.

Here consent to search was clearly limited to events related to Rust. Mr. Bowles texted Detective Hancock that the search was to be limited to the relevant timeframe for Rust and Detective Hancock replied, "Nothing whatsoever will be released if it's not in relation". Text Exchange attached as Exhibit B. Ms. Gutierrez Reed and Mr. Bowles relied on this promise by Detective Hancock in providing consent. That promise was initially upheld by Detective Hancock as the first search performed was appropriately limited. That promise was later broken by Ms. Morrissey in expanding the scope of the search from a specific search to a scope with no limits at all. This resulted in the special prosecutor discovering a video on Ms. Gutierrez Reed's phone that form the foundation of the government's case against Ms. Gutierrez Reed in the instant case. It is black letter law in New Mexico that the government cannot exceed the scope of consent to perform a search:

> "The officers' request, if it was for a search at all, was of a very limited scope and would not have given the officers carte blanche to go through Defendant's entire vehicle. *See State v. Flores*, 1996–NMCA–059, ¶¶ 22–23, 122 N.M. 84, 920 P.2d 1038 (**"When the police have stated that a search is for a particular purpose, they may not expand that search to a general exploratory search."** (internal quotation marks and citation omitted)); *see also State v. Celusniak*, 2004–NMCA–070, ¶¶ 3, 24, 135 N.M. 728, 93 P.3d 10 (concluding that a police officer's search of a passenger's purse found "crammed" under the driver's seat exceeded the scope of the driver's consent to search). "The scope of a search is limited by the actual consent given.""

State v. Martinez, 2010-NMCA-051, ¶ 22, 148 N.M. 262, 268, 233 P.3d 791, 797

The standard in New Mexico is that cope of consent is the scope of consent "actually given" which is a standard of objective reasonableness. *Flores*, 1996-NMCA-059, ¶ 23 ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"")(citing *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803–04, 114 L.Ed.2d 297 (1991)). Meaning that in a case like this where the scope to search is discussed over emails, text, and phone conversations a government actor cannot rely on any single piece of information concerning the scope of consent to search – they need to look at all of them to gain an understanding of the scope of consent "actually given". *Id.* The arguments that the consent to search form standing alone provides carte blanch to search is unreasonable for this reason – particularly in light of the fact that the form contains no language stating that the language in the form replaces or supersedes former discussions or agreements.

In New Mexico waiver of the attorney-client privilege is recognized only where the party holding the privilege seeks to limit its liability by describing the advice given by the attorney and by asserting that they relied on that advice, or where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail:

> "We therefore side with the minority of jurisdictions that require offensive or direct use of privileged materials before the party will be deemed to have waived its attorney-client privileges. In light of New Mexico's rule-bound law of privilege and the absence of Supreme Court case law to the contrary, which we discuss in the next section of our discussion, we believe the issue of waiver should be governed by, and limited to, Rule 11–511 (waiver of privilege by voluntary disclosure), in the absence of any other provision specifically addressing the issue. Our rules reflect a careful, methodical, approach to the development of the rules governing privileges—one that involves public participation and discourages ad hoc judicial intervention. On the other hand, application of the *Hearn*-type test would undermine the "full and frank" communications at the heart

> of the attorney-client privilege and would be contrary to the certainty that the rules themselves are intended to provide. Without such stability concerning to the privilege, how could an attorney and a client be able to predict, years later, whether their communications —intended to remain privileged—might be deemed by a later court to be "relevant" or "vital" regarding subsequent litigation. We believe the *Hearn* approach places this venerable privilege in harm's way, something we cannot countenance, and even at the expense of a zealous pursuit of truth. Any development or change in this area should be directed to our Supreme Court, our state's rule-making authority. We thus consider the *Rhone* approach to be based on sound principles and adopt it as law in New Mexico.
>
> The restrictive approach we adopt is consistent with the long-held view that the attorney-client privilege should act as a shield and not a sword. *See Weinstein's Federal Evidence* § 503.41[1]."

Pub. Serv. Co. of New Mexico v. Lyons, 2000-NMCA-077, ¶¶ 23-24, 129 N.M. 487, 494–95, 10 P.3d 166, 173–74.

Ms. Gutierrez Reed has not engaged in any so called offensive use of her attorney client communications. That is, she has not used the communications as evidence in this case. In the event Mr. Kenny testifies and provides a statement that contradicts previous statements he has made to the police or in his pre-trial interview Ms. Gutierrez Reed may well be faced with the impossible choice of impeaching Mr. Kenny with her own attorney client communications that Mr. Kenny has read. Without doing this Ms. Gutierrez Reed would not be able to prove that Mr. Kenny had changed his testimony based on exposure to privileged material. And if Ms. Gutierrez Reed *did* choose to impeach Mr. Kenny in this way, she would be engaged in the kind of offensive use of the privileged materials that would waive the privilege. No criminal Defendant should be faced with a choice like this one. It makes a fair trial impossible.

As to remedy, this situation is akin to a *Kastigar* type violation whereby it is not just the disclosure that violates the federal and state due process clauses and Sixth Amendment right to counsel, but it is also what occurred with that disclosure in terms of investigative leads. The problem is unfixable in this case. The State wants the jury to believe that Ms. Gutierrez Reed

brought the live rounds on set. Ms. Gutierrez Reed's investigation, and internal communications have candidly discussed her defenses to the State's arguments on this position, a good deal of these messages concern Mr. Kenny specifically in his role as ammo supplier to the Rust production.

Now, the State has made Mr. Kenney a pseudo state agent, by sharing with him 18,000 pages of information from Ms. Gutierrez Reed's phone, including her attorney client communications. The fact-finding process has been completely and irretrievably, corrupted.[2] It is unknown at this time whether Mr. Kenney has discussed that information with other witnesses, including Sarah Zachry, with whom he frequently talked and corresponded with during and after the Rust production. We do know that Mr. Kenney sent the information to his civil attorney, as the civil attorney was the person who conveyed it to the Court for *in camera* inspection. Again, it bears repeating that the special prosecutor completely corrupted the fact-finding process by sending Mr. Kenney any information from Ms. Gutierrez Reed's internal communications, most importantly her attorney client, but the 18,000 pages go beyond that and gave Mr. Kenney a complete blueprint to all of Ms. Gutierrez Reed's communications with friends, family, coworkers, and others. Counsel, who was a federal prosecutor for five years prior to becoming a defense attorney, has never seen a prosecutor do anything approaching this unquestionably unconstitutional conduct. In federal court cases involving so called white collar prosecutions with the seizure of voluminous documents including text messages and emails typically make up a much larger percentage of a US Attorney's Office criminal case load than we see in local District

[2] Even if Mr. Kenny was not given privileged materials providing witnesses with the state's view on evidence or information that would not be ordinarily available to a witness crosses the line from witness preparation into impermissible taint. *See* Bennett L. Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829 (2002), http://digitalcommons.pace.edu/lawfaculty/126/.]) at page 1 (" Witness coaching has been described as the "dark"-some have even called it "dirty secret of the U.S. adversary system." It is a practice, some claim, that more than anything else has given trial lawyers a reputation as purveyors of falsehood. Witnesses are prepared by lawyers in private, no records are kept, and the participants do not openly discuss the encounter").

Attorney's Offices in New Mexico. The solution in federal criminal practice to potential exposure to attorney client communications or other privileged information is to utilize taint or filter teams:

> "When the U.S. Department of Justice ("DOJ") executes a search warrant and seizes potentially privileged files, the fundamental protections offered by the attorney-client privilege, attorney work product protection, and other privileges and protections are put at risk. "Taint teams," also referred to as filter teams or privilege teams, have often been the government's answer. Create a team of prosecutors and agents who are screened from the investigation team and ask them to pass along only those communications that are neither privileged nor protected. As the Justice Manual puts it, "[T]o protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a 'privilege team' should be designated, consisting of agents and lawyers not involved in the underlying investigation."

Daniel Suleiman and Molly Doggett, Despite Inherent Risks to the Attorney-Client Relationship, Taint Teams Are Here to Stay (for Now), The ABA/CJS White Collar Crime Committee Newsletter (Winter/Spring 2022) available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2022/filter-suleiman.pdf. (citing Justice Manual § 9-13.420; see also id. § 9-13.400(D)(7) ("In executing a warrant . . . , investigators should use protocols designed to minimize intrusion into potentially protected materials . . . , including but not limited to keyword searches (for electronic searches) and filter teams.")

Here, shockingly, the government did not use any filter or taint team. Even more shocking is that they made that decision after removing the other protection against the disclosure or exposure of privileged communications commonly used by the government when searching electronic evidence – keyword searches and filters. It would have been very easy to exclude the phone numbers of counsel from this search – undersigned counsel has actual knowledge as to what Mr. Bullion's and Mr. Bowles' cell phone numbers are. Instead, after removing any and all filters the government reviewed the evidence without any mechanism in place to prevent exposure to confidential information. The special prosecutor stated that she believes no state actors saw attorney client communications when the previous report was generated specifically because she believed Detective Hancock had told RCFL to exclude them:

Hannah attorney client texts

Kari Morrissey <ktm@morrisseylewis.com> Fri, Jul 28, 2023 at 5:56 PM
To: Jason Bowles <jason@bowles-lawfirm.com>
Cc: "Jason J. Lewis" <jjl@jjllaw.com>, Todd Bullion <toddjbullion@gmail.com>

Jason

Seth Kenney originally contacted us months ago and left a message with our secretary. We instructed her to tell him that we could not speak to him because he was represented by counsel. We then made numerous attempts to get his attorneys to coordinate a meeting between us and Seth and his attorneys never responded. Then Seth Kenney called my cell phone (I don't recall the date but I can find out by looking through call logs). I immediately explained to him that I could not speak to him without his attorneys and he agreed to waive any right to have them present. You and I did not ask him to renew that waiver on 7/11 when he was interviewed but he certainly could have had them present if he wanted them to be there (and he's not a criminal defendant who has a right to counsel).

I believe no one saw the AC messages when the previous report was generated. The raw data went to RCFL and a report was generated that did not include the messages (presumably because Hancock told RCFL to exclude them). We

If Detective Hancock knew there were reasons to use filters or exclusions in the search that knowledge is imputed to the prosecutors working on the case because the police and prosecutors are all agents of the State under New Mexico law and are on the same prosecution team. *State v. Stevenson*, 2020-NMCA-005, ¶ 16, 455 P.3d 890, 897(citing *Case v. Hatch*, 2008-NMSC-024, ¶ 46, 144 N.M. 20, 183 P.3d 905 (explaining that "the 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of the case" (alteration, internal quotation marks, and citation omitted)); *see also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824, 831-32 (10th Cir. 1995) (discussing a prosecution team theory and imputation of knowledge to the prosecutor).

This concept of shared notice between law enforcement and prosecutors in a criminal case is most often seen in situations where a *Brady* violation is alleged to have occurred. The driving force behind the decisions cited above, *Stevenson*, *Hatch*, and *Smith* is to protect the integrity of due process and ensure fair trials:

> "The focus of a due process analysis in *Brady* cases is on **" 'the fairness of the trial, not the culpability of the prosecutor.' "** *Smith*, 50 F.3d at 823 (quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Thus, it is irrelevant

whether the prosecutor failed to disclose evidence either intentionally or negligently. *Chacon v. State,* 88 N.M. 198, 199, 539 P.2d 218, 219 (Ct.App.1975)."

Case v. Hatch, 2008-NMSC-024, ¶ 45, 144 N.M. 20, 33, 183 P.3d 905, 918, disapproved in later proceedings, 773 F. Supp. 2d 1070 (D.N.M. 2011), vacated, 708 F.3d 1152 (10th Cir. 2013), opinion superseded on reh'g, 731 F.3d 1015 (10th Cir. 2013)and vacated, 731 F.3d 1015 (10th Cir. 2013)(emphasis in the original).

In the instant case the deprivation of the Defendant's right to counsel also implicates due process and the fairness of the trial itself. It follows that the subjective mental state of the prosecutor should be analyzed in the same way. *Id.* Meaning it does not matter if the disclosure of the privileged material was intentional or negligent. *Id.* In any event – the fact that Detective Hancock knew to exclude communications between Mr. Bowles and Ms. Gutierrez Reed is evident by the fact that she did exactly that in the first search or report generation of Ms. Gutierrez Reed's cell phone. The special prosecutor cannot plead ignorance of what the lead detective on the case actually knew to excuse the constitutional violation that occurred in this case – particularly so when it appears they spoke to Detective Hancock about the search parameters discussed between her and Mr. Bowles a week after they received the second extraction and provided it to Mr. Kenney. This pattern of facts shows that they were seeking to establish a post hac rationalization or defense for the violation of Ms. Gutierrez Reed's right to counsel – not that they had performed a diligent check as to the scope of consent ahead of performing the search or second report generation.

The remedy that is appropriate, not only for this individual case, but also to preserve the integrity of the system as whole and avoid any appearance of impropriety, is dismissal. There is no way to "unring" the unconstitutional bell that has tolled in this case, repeatedly. Ms. Gutierrez Reed, no matter how much she is slandered, or attacked by the special prosecutor or others in pleadings and the media, enjoys the same constitutional rights as we all do and demand. The

system demands that sometimes a case be dismissed to preserve its integrity where serious constitutional violations have occurred. This is that unusual case.

For all these reasons and those stated in the Motion, the charges should be dismissed.

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 9th day of February 2024, to the counsel listed below:

Kari Morrisey
Jason Lewis
Special Prosecutors
1st Judicial District Attorney's Office

/s/ Todd J. Bullion
Todd J. Bullion
Law Office of Todd J. Bullion