

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 FOR DISMISSAL, OR IN THE ALTERNATIVE TO SUPPRESS ALL  
DISCLOSURES AND USE OF ATTORNEY CLIENT COMMUNICATIONS AND FOR  
RECUSAL OF THE PROSECUTORS**

---

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, respectfully moves this Court in the alternative to: 1) conduct a hearing to suppress any and all disclosures of attorney client communications, as well as the use of those by the State to develop witnesses or case theories through the special prosecutor's contacts with Seth Kenney; 2) for recusal of the special prosecutors as they have talked to the primary witness to whom they disclosed the attorney client communications; and 3) for dismissal of all charges due to outrageous government misconduct.

The government sharing attorney client work product with a material witness adverse to Ms. Gutierrez Reed is unprecedented and a serious, irreversible violation of Ms. Gutierrez Reed's right to counsel. Mr. Kenney has worked with the police and helped guide the investigation and narrative of the investigation from its outset. Due to his unique involvement in the investigation and his role as the primary ammunition supplier to Rust suppression of his testimony alone is not a feasible remedy. As the special prosecutor noted in the status hearing on January 17, 2024, all

taint flowing from the release of the confidential communications to Mr. Kenney needs to be suppressed.

Yet, the complication of determining an adequate remedy short of dismissal is very difficult. Mr. Kenney has received defense attorney client communications. He has been in relatively constant contact with the prosecution and Sheriff's investigator since the beginning of this case, attempting to help them steer the case theories and even whom to prosecute. By violating the sanctity of the attorney client privilege, the sanctity of the fact finding process has been irretrievably corrupted. There is no way to "unring the bell." The intent of the prosecutor is not important. The problem is the serious harm to the client, to our system of justice and its perception, and the absolute corruption of the fact finding process.

#### FACTS

After the tragic death of Halyna Hutchins, the Santa Fe County Sheriff's Office opened an investigation. Detective Alexandra Hancock was the lead investigator. As part of her investigation, she interviewed numerous people including but not limited to Sarah Zachary, Alec Baldwin, and Hannah Gutierrez Reed. As part of her investigation Hancock requested to search Sarah Zachary's phone, Hannah Gutierrez Reed's phone and Alec Baldwin's phone. Ms. Zachary and Ms. Gutierrez Reed each provided consent to search their phones. Mr. Baldwin refused to provide consent to search his phone. His phone was ultimately searched after a warrant was issued and executed in the State of New York.

Counsel had at least two conversations with the lead investigator, Alexandria Hancock in which they discussed that the search would be limited to Rust related material, no private material or unrelated material, and certainly no attorney client communications. Based on those discussions, and the government agent's word, Ms. Gutierrez Reed signed the consent form, again,

informed by counsel's communications and assurances by the Sheriff's lead investigator that she would not search for anything but Rust related materials. Text Messages Between Hancock and Jason attached as **Defendant's Exhibit A**. Detective Hancock asked that Ms. Gutierrez Reed sign a consent to search form after Mr. Bowles informed her that Ms. Gutierrez Reed would be willing to allow her phone to be searched. The text conversation between Mr. Bowles and Ms. Hancock was on November 24, 2021. The consent to search form was executed by Ms. Gutierrez Reed on December 7, 2021. The consent to search form did not contain boxes to check or other conspicuous ways to indicate that consent to search would be limited. That the consent was limited is also supported by the fact that the Sheriff's first extraction and download and report from RCFL, did not contain any attorney client communications or any unrelated material. The boiler plate consent form did not modify the previous agreement made limiting scope. The form does not have a merger or integration clause that says it supersedes any past oral agreements or that the whole consent to search is contained in 4 corners of the document. Moreover, counsel was assured by Investigator Hancock that no attorney client communications would be retrieved. Consent to Search Form attached as Defendant's **Exhibit B**.

Any reasonable person looking at this form would not draw the conclusion that discussions had regarding the limits of the search would be thrown out or ignored. Ms. Gutierrez Reed additionally never gave consent for the contents of her cell phone to be shared with any third parties.

Hannah's phone was collected, and dump performed on December 8, 2021. An extraction was created that was limited in scope and contained in total 1,157 pages. This extract did not contain conversations between Ms. Gutierrez Reed and her counsel and did not reveal counsel's work product or trial strategy. The second extract created at the request of Ms. Morrisey is 18,096

pages in length and contains several hundred pages of conversation between Ms. Gutierrez Reed and Mr. Bowles. Every single communication they had from the inception of their attorney client relationship until the phone was extracted on December 8, 2021, are contained in this extract.

No limitations were put on the second extract to exclude attorney client communications. This could have easily been done – it appears that this was done as part of the first extraction which did not contain hundreds of text messages between Ms. Gutierrez Reed and Mr. Bowles. No screening process was utilized by the special prosecutors to identify privileged communications and screen themselves from having access to those communications.

In circumstances where prosecutors either have actual knowledge or reasonably anticipate that documents to be searched as part of an investigation may contain attorney client communications a “filter team” or “taint team” is normally utilized:

“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.””<sup>1</sup>

The use of taint teams has been criticized due to the inherent dangers in having a prosecuting entity review documents for privilege.<sup>2</sup> Here the special prosecutor knew or should have know that an unlimited and unfiltered extraction would contain privileged communications between Ms. Gutierrez Reed and her counsel. The fact that no steps whatsoever were taken to

---

<sup>1</sup> 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, at page 1. (Quoting Department of Justice Manual § 9-13.420).

<sup>2</sup> *Id.*

screen out privileged communications is shocking. Ms. Morrisey received the second full extract of Ms. Gutierrez Reed's phone on July 11, 2023. Email from Morrisey regarding attorney client texts attached as Defendant's **Exhibit C**. Ms. Morrisey reviewed the messages the same day she received them – the content of the message prompted her to call Mr. Kenney, “The second report was provided to us on July 11, 2023, and it only contained the messages. On that same day I viewed messages between Hannah and one of her friends that concerned Seth and his involvement and that prompted my call to Seth.” *Id.* Given that these messages were reviewed by the assigned prosecutor on the same day of receipt it is not possible that any type of filter team or other screening process was used prior to the messages being reviewed. *Id.* Ms. Morrisey indicated that following this phone call she received an IPRA request from Mr. Kenney for the messages Ms. Morrisey had just told him about. *Id.* Ms. Morrisey further stated that Mr. Kenney likely received the messages on July 12, 2023, because she responded to his request “almost immediately”. *Id.*

These messages were disclosed to a third party by Ms. Morrisey without having any screening done for attorney client communications or other categories of information that are excluded from disclosure under New Mexico's IPRA statute. *See* N.M. Stat. Ann. § 14-2-1 (G)(stating that attorney client communications are exempt from disclosure under IPRA). It is surprising that an attorney would immediately send an 18,000 page document without engaging in a check for information that would need to be redacted under New Mexico's IPRA statute.

Mr. Kenney is a material witness adverse to Ms. Gutierrez Reed in several key respects of this case – specifically the fact question as to who caused live rounds to be introduced to the Rust movie set. Mr. Kenney supplied dummy rounds and blank ammunition to the Rust production including .45 long colt dummies. Defense counsel believes the evidence at trial will show that the live rounds made their way onto the Rust set from PDQ which is owned and operated by Mr.

Kenney. The specifics of this defense, which is central to Ms. Gutierrez Reed's defense, are discussed between her and her counsel on the text messages that the government sent to Mr. Kenney. This adverse witness had access to both fact and opinion work product of Mr. Bowles on the key issue in this case that concerns Mr. Kenney. The mental impressions of Mr. Bowles were shared with Ms. Gutierrez Reed who in turn shared her mental impressions with Mr. Bowles. Mr. Kenney is now in the best position possible to frustrate determining the truth as to how the live rounds made their way on to set. This defense strategy was discussed with discussion on how discrete pieces of evidence relate to Kenney as the source of the live rounds on set.<sup>3</sup>

It was not until July 25, 2023, that Ms. Morrissey first alerted counsel to the problem with these attorney client texts being disclosed to a primary adverse witness, Mr. Kenney. Email attached as Defendant's **Exhibit D**. Within that email, Ms. Morrissey noted that the first extraction "raw data went to RCFL and a report was generated which did not include the [attorney client] messages (presumably because Hancock told RCFL to exclude them). We just did not realize that they were in the raw data ...". Ms. Morrissey also indicated that the "attorney client communications were provided to the state (unknowingly) and were in turn provided to Mr. Kenney (we intended to provide him texts and were not aware that it contained privileged communications." *Id.* Thus, Mr. Kenney had the attorney client texts for approximately 13 days prior to the government realizing the violation and taking steps to notify counsel and to instruct Mr. Kenney to delete the messages. It is impossible to tell whether Mr. Kenney reviewed the attorney client texts, but counsel assumes that he did, having specifically requested all texts and having them for over two weeks. We do know for a fact that these messages were retained by Mr.

---

<sup>3</sup> The 18,096-page document provided to Mr. Kenney by the special prosecutor's office has been submitted to the court for in camera review. The page numbers of that document of concern include 196, 208-209, 216-219, 222, 224-226, 229-230, 256-258, 267-272, 279-280, 283-285, 287, 290-292, 295-296, 299-300, and 303-305.

Kenney's counsel, Mr. Hatcher, because Mr. Hatcher has provided the messages to the court and Ms. Gutierrez Reed's counsel after the court's oral order for production for in camera review.

## **LAW AND ARGUMENT**

### A. Right to Counsel Has Been Violated, Law on Dismissal and Recusal

There is no question that a violation of Ms. Gutierrez Reed's attorney client privilege and right to counsel has occurred. The question is the appropriate remedy. A diligent search of New Mexico court cases reveals no identical precedent where a prosecutor has disclosed vast amounts of attorney client material to a third party, critical witness in the case. It is likely there is no reported case because no prosecutor would ever deem this acceptable and indeed in counsel's thirty years of practice, he has never seen anything like this. This is a quintessential instance of complete prosecutorial misconduct that strikes at the core of fundamental fairness, due process, and right to counsel. Counsel has found cases out of state and federal cases in which attorney client violations have been found and remedies the Courts have imposed and they are analyzed below.

The New Mexican Constitution provides for the right to counsel for all persons in criminal proceedings. N.M. Const. art. II, § 14. The 6<sup>th</sup> Amendment of the United States Constitution also provides for the right to counsel. Courts treat the breach of the attorney client privilege of a criminal defendant as a violation of the right to effective counsel under the 6<sup>th</sup> Amendment. *State v. Robinson*, 209 A.3d 25, 28 (Del. 2019) (“The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”<sup>1</sup> This right is “indispensable to the fair administration of our adversarial system of criminal justice.”<sup>2</sup> It “safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. “When the State deliberately invades that right, the integrity of the adversarial process is threatened.”)

The attorney client privilege is one of the bedrocks of the American legal system. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, (2009) (“We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications. By assuring confidentiality, the privilege encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves broader public interests in the observance of law and administration of justice.”)(internal citations and quotation marks omitted).

An intrusion by the government into an attorney-client relationship to obtain confidential information constitutes a violation of a defendant's Sixth Amendment right to effective assistance of counsel. *See Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (“When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant.”) (citing *Williams v. Woodford*, 384 F.3d 567, 584-85 (9th Cir. 2004) and *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980)). In such situations, a court may suppress evidence gathered because of the communication or, in egregious cases where the prejudice cannot otherwise be cured, dismiss the indictment. *See United States v. Haynes*, 216 F.3d 789, 796 (9th Cir. 2000), *cert. denied*, 531 U.S. 1078 (2001); *United States v. Marshank*, 777 F. Supp. 1507, 1521-22 (N.D. Cal. 1991). In tailoring relief for infractions of the attorney-client privilege that amount to constitutional violations, the proper approach is “to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.” *Shillinger v. Haworth*, 70 F.3d 1132, 1143 (10th Cir. 1995) (quoting *Morrison*, 449 U.S. at 365, 101 S. Ct. at 668).



This Court possesses the “inherent power to dismiss a criminal prosecution as a sanction against the government.” *Harrison*, 311 P.3d at 1243; *see, e.g., State v. Candelaria*, 2008-NMCA-120, 192 P.3d 792, 801; *State v. Lopez*, 99 N.M. 385, 388, 658 P.2d 460, 463 (Ct. App. 1983). As the court of appeals has explained, “[t]he policy behind a district court’s inherent authority is the need to prevent abusive litigation practice and preserve the integrity of the judicial process.” *Harrison*, 311 P.3d at 1243. The exercise of that power is appropriate when the government “engage[s] in unethical conduct for which a private litigant would surely be sanctioned.” *Id.* To be sure, in fashioning a sanction, the Court must also consider 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 case.” *State v. Jackson*, 135 N.M. 689, 694, 92 P.3d 1263, 1268 (Ct. App. 2004). Dismissal of criminal charges is an “extreme sanction to be used only in exceptional cases,” but this case is exceptional in the breadth and gravity of the attorney client violation. *Mathis v. State*, 1991-NMSC-091, ¶ 13, 112 N.M. 744, 747, 819 P.2d 1302, 1305.

Relatedly, the work-product doctrine covers documents or materials prepared by an attorney or an attorney's agent in preparation for litigation and protects such documents or materials from discovery. *See United States v. Nobles*, 422 U.S. 225, 238-39 (1975). This doctrine is essential to the attorney-client relationship because attorneys must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). "Proper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. Together, "the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment's

guarantee of effective assistance of counsel." *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019).

Additionally, the Court on finding a violation of the attorney client privilege can elect to recuse the prosecutor. See *United States v. Horn*, 29 F.3d 754, 757-58 (1st Cir. 1994). (court concluded that prosecutorial misconduct amounted to a violation of the defendants' Fifth and Sixth Amendment rights; found prejudice, and imposed a combination of remedies, which included recusal of the lead prosecutor, as well as her referral to various disciplinary authorities. *Id.* at 759). This most often occurs, however, when the “taint” is only with the prosecution team.<sup>4</sup>

In a Delaware Supreme Court case, *State v. Robinson*, 209 A.3d 25, 53–54 (Del. 2019), the government seized and reviewed all the notes in the Defendant’s jail cell which included communications between him and his counsel, Woloshin. The lead prosecutor did not set up a taint team at this point to review the seized documents, but instead selected Jamie Prater, a paralegal assigned to two of the Defendant’s criminal cases and an “integral part of the prosecution team” to review the seized documents. *State v. Robinson*, 209 A.3d 25, 32 (Del. 2019). Prater testified that the lead prosecuting attorney did not instruct her regarding what to review and she was not instructed by anyone to avoid privileged material. *Id.* Prater reviewed the materials taken from the Defendant’s jail cell and was exposed to Defendant's privileged attorney-client communications in detail, including letters from Woloshin and handwritten notes reflecting Woloshin's communications, from which Prater learned details of the defense trial strategy. Prater was then allowed to “remain on the Prosecution Team and work with the Trial Prosecutors” on the

---

<sup>4</sup> See <https://variety.com/2022/film/news/harvey-weinstein-prosecutor-email-attorney-client-1235396800/> (prosecutor on Weinstein case removed for being told of a confidential email between Weinstein and his defense lawyer).

State's final trial preparations, and the court found that the State did not implement any process to effectively screen the Trial Prosecutors from the investigation.

The trial court conducted an in-camera review of the documents the State had seized from the Defendant's cell, after considering testimony from the government actors and considering briefing the trial court dismissed the Defendant's indictment with prejudice due to the violation of his right to counsel. This decision was support in large part by the fact that the government did not utilize a taint team or any screening procedures. *State v. Robinson*, 209 A.3d 25, 43–44 (Del. 2019) (“[T]he State failed to employ a taint team. Instead, “the State took no steps to screen the Prosecution Team to protect the integrity of the attorney-client privilege.”). The Delaware Supreme Court affirmed the finding that a 6<sup>th</sup> Amendment violation had occurred but reversed as to the remedy of dismissal because they found that the taint was not “irreparable”. *Id.* at 58.

In the instant case Ms. Gutierrez Reed has suffered irreparable injury that cannot adequately be cured with alternate remedies to dismissal considered by the Delaware Supreme Court in *Robinson* such as suppression of a witness, destruction of the State's work product, or replacement of the prosecution team. *Id.* at 44. This is because Mr. Kenney is an essential witness for the Defense as well – suppression of his testimony all together will further harm Ms. Gutierrez Reed. Yet, Mr. Kenney, because of his involvement in communicating with the various prosecutors and sheriff's investigator, has taken on a role in this case akin to the paralegal, Prater, in the Delaware case.

Although recusal of the prosecutors is a possible remedy, replacing the prosecution team will not alter the fact that Mr. Kenney has been provided with attorney client communications discussing counsel's mental impressions regarding Mr. Kenney, discussion of trial strategy centered on Mr. Kenney, and Ms. Gutierrez Reed's discussions with counsel regarding that trial

strategy. Ordering destruction of government work product likewise will not solve this problem. The taint has spread from the office of the special prosecutor to a material witness. Mr. Kenney now knows how the Defense planned to put on their case with respect to evidence connected to him and his testimony.

Mr. Kenney has had discussions with Sheriff's office deputies and prosecutors throughout this case, helping them with theories and attempting to steer the investigation as to where the live rounds originated from. This has most recently emerged with Ms. Morrisey attempting to claim that Ms. Gutierrez Reed was the source of the live rounds, as opposed to Mr. Kenney, who the state never seriously investigated. Now, armed with knowledge of Ms. Gutierrez Reed's attorney client texts, and essentially made a government cooperator, Mr. Kenney is a government trojan horse, and Ms. Gutierrez Reed's ability to obtain a fair trial with an uncorrupted fact finding process is forever lost. There is no way to cure this taint aside from the dismissal of the indictment.

Yet another reason Mr. Kenney cannot be suppressed as a witness is his likely involvement in directing Sarah Zachary to destroy evidence - specifically .45 long colt dummy and suspected live rounds. Ms. Zachary texted Mr. Kenney shortly after the shooting.

From: +15052641702 Sarah Zachry (owner)  
To: +19492578790 Seth Kenney  
To: sarahpandabeara@gmail.com Sarah Zachry (owner)

## EMERGENCY

Participant	Delivered	Read	Played
+19492578790 Seth Kenney	10/21/2021 1:55:48 PM(UTC-6)		
sarahpandabeara@gmail.com Sarah Zachry			

Status: Sent

10/21/2021 1:55:48 PM(UTC-6)

Source Extraction:  
Advanced Logical, Logical

They then talked on the phone for several minutes. Ms. Zachary then threw several rounds into the trash. Ms. Zachary did this knowing that law enforcement would be coming to Bonanza Creek. Out of the thousands of rounds at Bonanza Creek she selected a specific few to be thrown away. The jury needs to hear both Seth Kenney and Sarah Zachary be questioned about this and to evaluate their credibility on the witness stand. Incidentally - the government recently provided Ms. Zachary with a promise to not prosecute her for any crimes she may have committed in exchange for her cooperation. Cooperation Agreement attached as Defendant's **Exhibit E**. This order was perplexingly signed by Mary Carmack-Altwies who was ordered to no longer participate in the prosecution of this matter. The fact that the special prosecutor and Ms. Carmack-Altwies would do this, in the face of the Court's clear prior order is further evidence of the prosecutions' disregard for rules, the constitution, and Court orders.

The practical problems in removing the taint from the violation of Ms. Gutierrez Reed's attorney client privilege is similar to a breach of attorney client privilege in a 10<sup>th</sup> Circuit case, *Shillinger v. Haworth*, 70 F.3d 1132, 1139–40 (10th Cir. 1995). The *Shillinger* case involved an in custody defendant who had a sheriff's deputy present in a courtroom for in court prep sessions with him and his attorney. *Id.* The deputy told the prosecutor assigned to the case about the prep sessions and what was discussed. Specifically, the deputy told the Defense counsel's instruction to the Defendant to describe how he acted in self-defense as "cutting" vs. "stabbing" someone. *Id.* At trial the Defendant was cross examined by this same prosecutor who took advantage of his knowledge of the prep session during cross. The prosecutor also utilized this information in closing argument pointing out that the Defendant was the only person to describe the physical action as cutting instead of stabbing. *Id.*

The *Shillinger* court found that a 6<sup>th</sup> amendment violation had occurred and affirmed the trial court's finding in that respect. However, the 10<sup>th</sup> Circuit reversed the trial court on its choice of remedy – simply ordering a new trial. The 10<sup>th</sup> Circuit held at a minimum that “any fruits of the prosecution's transgression” would need to be suppressed. The 10<sup>th</sup> Circuit additionally directed the trial court to engage in more robust fact finding as to the taint and stated that the trial court may order a new trial with a new prosecuting attorney or dismissal with prejudice in the event of evidence of permanent or irreparable harm to the Defendant. *Id.* The 10<sup>th</sup> Circuit cited to two examples of extreme circumstances that warranted dismissal with prejudice in other situations were a defendant had been permanently harmed: 1) the government losing potentially exculpatory evidence; and 2) the government's destruction of potentially exculpatory evidence. *Id.* at 1143 (citing *United States v. Bohl*, 25 F.3d 904, 914 (10th Cir.1994) and *California v. Trombetta*, 467 U.S. 479, 486–87, 104 S.Ct. 2528, 2532–33, 81 L.Ed.2d 413 (1984)).

*Shillinger* is like the instant case because both cases deal with the disclosure of communications about trial preparation and trial strategy between counsel and their client on specific points of their defense on material issues in the case. In *Shillinger* counsel suggested that a self-defense claim would be better received with a specific description of cutting instead of stabbing. The prosecutor was armed with information to defeat this defense by virtue of knowing how the defense would be presented. In the instant case the special prosecutor provided Mr. Kenney, with the Defendant's trial strategy, counsel's mental impression, and Defendant's mental impression as to how Mr. Kenney caused live rounds to come on to the set. Mr. Kenney has every reason in the world to blame someone other than himself for this action. In both *Shillinger* and the instant case the actions of the prosecutor caused significant portions of a defendant's trial strategy to be exposed to people who were best positioned to use that information against the Defendant.

#### B. Law on Scope of Consent of Searches and Suppression

In New Mexico when a person provides voluntary consent for a search the scope of that consent may be limited. *State v. Flores*, 1996-NMCA-059, ¶ 22, 122 N.M. 84, 91, 920 P.2d 1038, 1045. When a government actor executes a search based on a person's voluntary consent they may not search outside of the scope of consent. *Id.* If the government does search beyond the scope of consent that search is unlawful and must be suppressed. *Flores*, 1996-NMCA-059, ¶ 23 (“When the police have stated that a search is for a particular purpose, they may not expand that search to “ a general exploratory search.” *Id.* (quoting *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir.1971))). A consensual search becomes unreasonable when it goes beyond the scope of a suspect's consent. *Dichiarinte*, 445 F.2d at 129. Here consent was given in a limited manner. This was done precisely to not allow a general exploratory search – which is exactly what the special prosecutor did.

In *State v. Eder*, 103 N.M. 111 (Ct. App. 1985), the Court of Appeals upheld suppression of evidence due to prosecutor misconduct in improperly issuing subpoenas in that case. There the Court discussed the alternative remedies of suppression versus dismissal. “To support a dismissal of a criminal charge because of prosecutorial misconduct, the alleged misconduct must result in actual and substantial prejudice to a defendant.” *Eder*, 103 N.M. at 113 (citing *People v. Barton*, 122 Ill. App.3d 1079, 78 Ill. Dec. 419, 462 N.E.2d 538, 542 (1984)). The *Eder* Court cited various authorities and discussed suppression of evidence and testimony as the appropriate remedy in most instances of prosecutor misconduct rather than outright dismissal, absent a showing of actual and substantial prejudice. *Eder*, 103 N.M. at 113-115.

In addition to the issues discussed at length regarding the violation of attorney client privilege Ms. Gutierrez Reed’s 4<sup>th</sup> Amendment rights were also violated by exceeding the scope of consent provided for search. The government then made this injury impossible to repair by disseminating the information they illegally obtained to a third party. It bears repeating that Ms. Gutierrez Reed never gave consent for the redistribution or disclosure of information found on her phone to any person outside of the law enforcement agency that investigated Ms. Hutchins death. This provides a separate ground for sanctions.

### C. Conclusion

The special prosecutor directed that a second extraction of Ms. Gutierrez Reed’s phone take place without filters or limits, which she then received and immediately began reviewing with no process in place to screen out attorney client communications, and she then immediately gave those documents to a material witness in this case without engaging in review for protected and confidential information as required by New Mexico’s IPRA statute. Because of these actions which at best could be described as extreme negligence and at worst intentional acts on the part of



the prosecution Mr. Kenney has seen these communications and is in essence armed for direct and cross examination with the Defendant's case theories - specifically case theories involving Mr. Kenney. This has caused extreme prejudice to Ms. Gutierrez Reed which cannot be solved by suppressing Mr. Kenney or replacing prosecutors on the case. Mr. Kenney is an integral part of this case who the jury needed to hear from to engage in their role as fact finders. It is simply not possible to remove this taint from Mr. Kenney and it is not possible to remove Mr. Kenney from this case.

When a breach of a criminal defendant's attorney client privilege causes irreparable injury dismissal with prejudice is the appropriate remedy. See *United States v. Syed*, 1995 WL 216874, at 1 (7th Cir. 1995)(interpreting *Morrison* to mean that "indictments must not be dismissed unless the government's conduct following the commission of the crime not only is unlawful but also causes irreparable prejudice to the defense of the charge" (emphasis added) ); *United States v. Bohl*, 25 F.3d at 914 (dismissing the indictment because of the government's destruction of potentially exculpatory evidence and violation of defendant's due process rights); *State v. Robins*, 431 P.3d at 272 ("[D]ismissing the charges should remain an option if the circumstances are such that prejudice arising from the State's prior transgression cannot be completely purged or escaped.").

Respectfully submitted,

/s/ Jason Bowles

Jason Bowles

Bowles Law Firm

4811 Hardware Drive, N.E., Bldg D, Suite 5

Albuquerque, N.M. 87109

Telephone: (505) 217-2680

Email: [jason@bowles-lawfirm.com](mailto:jason@bowles-lawfirm.com)

-and-

Todd J. Bullion  
4811 Hardware Drive, N.E., Bldg D, Suite 5  
Albuquerque, N.M. 87109  
Telephone: (505) 494-4656  
Email: todd@bullionlaw.com

**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 18<sup>th</sup> day of January, 2024, to the counsel listed below:

Kari Morrissey  
Jason Lewis  
Special Prosecutors  
1<sup>st</sup> Judicial District Attorney's Office

/s/ Jason Bowles  
Jason Bowles  
Bowles Law Firm

EXHIBIT A

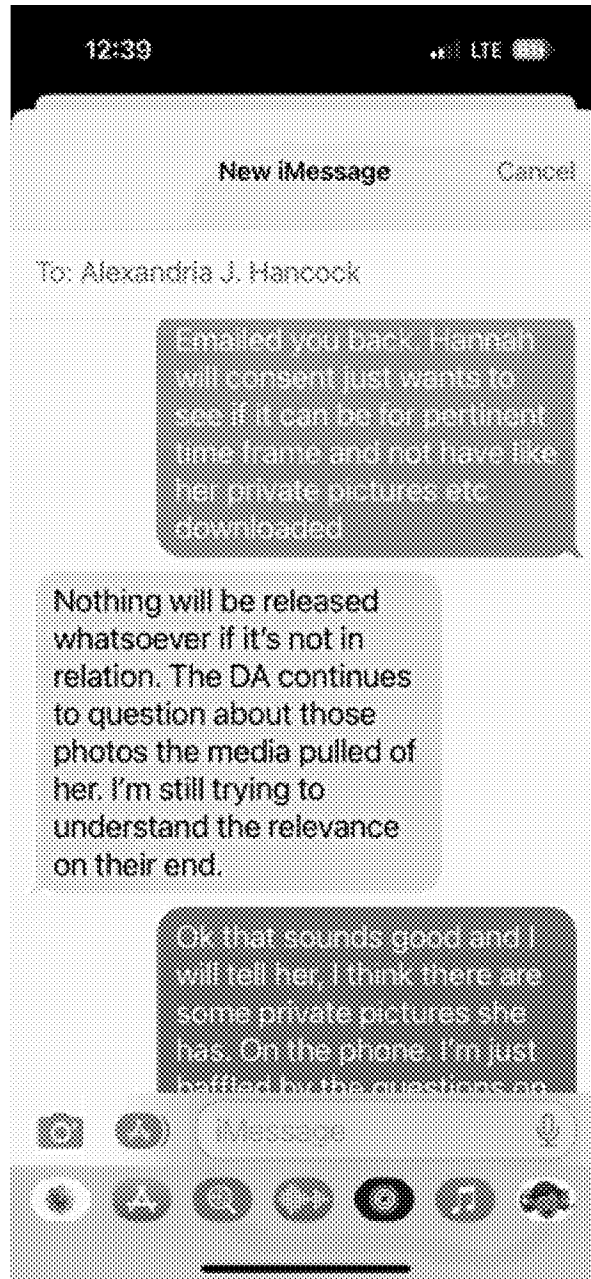
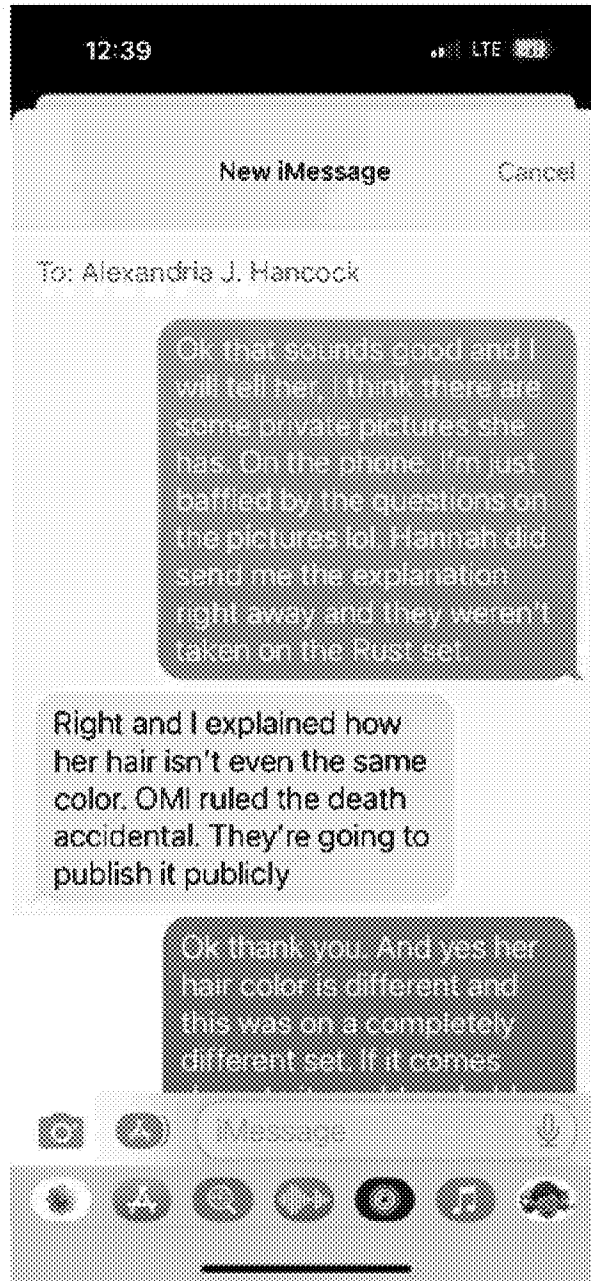
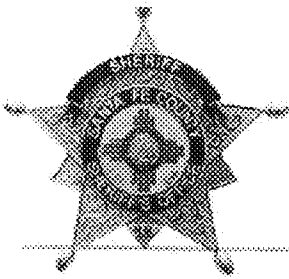


EXHIBIT A





Sheriff Adan Mendoza – amendoza@santafecountynm.gov  
 Undersheriff Ken Johnson – kjohnson@santafecountynm.gov

35 Camino Justicia, Santa Fe, NM 87508  
 Office: (505)986-2455 Fax: (505)986-2410

**Consent to Search Authorization**

Case #: <u>2021007949</u>	Date: <u>12/7/2021</u>
Location: <u>RCFL - Albuquerque</u>	Time: <u>3:10 PM</u>

*BEFORE ANY SEARCH IS MADE, YOU MUST UNDERSTAND WHAT YOUR RIGHTS ARE:*

- You may refuse to consent to search and demand that a search warrant be obtained prior to any search described below.
- If you consent to a search, anything of evidentiary value seized in the course of the search can and may be introduced into evidence in a court of law against you.

I, Hannah Coyte-Herz, HAVING READ THE ABOVE STATEMENT OF MY RIGHTS, AM FULLY AWARE OF WHAT MY RIGHTS ARE AND HEREBY VOLUNTARILY GIVE CONSENT TO A SEARCH WITHOUT A WARRANT BY SANTA FE COUNTY SHERIFFS OFFICE REPRESENTATIVE Detective Alexandra Hancock

<b>VEHICLE:</b>	Year:	Make:	Model:
Color:	Plate:	VIN:	

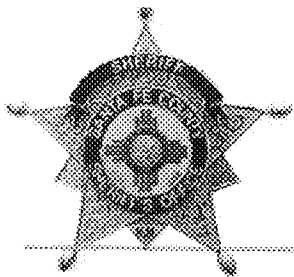
<b>PHONE/PHONE EXTRACTION:</b>	Make: <u>Apple</u>	Model: <u>iPhone A2342</u>
Carrier: <u>AT&amp;T</u>	Serial No: <u>IMEI 357771750121142</u>	Passcode: <u>6666669</u>

<b>RESIDENCE/PROPERTY:</b>	Location:
Description:	

Additional notes:

Authorization to do the extraction/search without being present.

EXHIBIT B



Sheriff Adan Mendoza -- amendoza@santafecountynm.gov  
Undersheriff Ken Johnson -- kjohnson@santafecountynm.gov

35 Camino Justicia, Santa Fe, NM 87508  
Office: (505)986-2455 Fax: (505)986-2410

I authorize the Deputies/Detectives of the Santa Fe County Sheriff's Office to seize any article of questionable nature, or contraband from my vehicle/residence/property, or any items that may be deemed to be of evidentiary value.

By signing below, I am providing written consent/permission for the above named Deputy/Detective(s), or their designee(s), to conduct the search without obtaining a warrant and seize any evidence outlined above. I give consent/permission freely and voluntarily without threats or promises of any kind, either express or implied, made to me or someone close to me to convince me to grant consent/permission to search the property described above.

I will not hold the Sheriff of Santa Fe County, or any agent acting on behalf of the Sheriff's Office liable.

Hannah Gutierrez Reed

Printed Name

[Signature]

Signature

12-7-21

Date & Time

Jason Bowles

Witness Printed Name

[Signature]

Signature

12-7-21

Date & Time



Todd Bullion &lt;toddjbullion@gmail.com&gt;

---

## Hannah attorney client texts

---

Kari Morrissey &lt;ktm@morrisseylewis.com&gt;

Fri, Jul 28, 2023 at 4:37 PM

To: Jason Bowles &lt;jason@bowles-lawfirm.com&gt;, "Jason J. Lewis" &lt;jjl@jjllaw.com&gt;, Todd Bullion &lt;toddjbullion@gmail.com&gt;

Jason and Todd

There was not a second extraction. The original extraction was done on December 8, 2021 as I recall - I believe it was done on the day Jason and Hannah went in for Hannah's second interview and signed the consent. After that extraction a report was issued by RCFL which was incomplete as it didn't even contain all of Hannah's messages the few days prior to the shooting. I had the raw data from the original extraction sent to an expert in California and he generated the report that is now on the defense server which Jason Lewis and I no longer have access to as we deleted all copies of it. I did not realize that the communications were contained in the raw data.

The second report was provided to us on July 11, 2023 and it only contained the messages. On that same day I viewed messages between Hannah and one of her friends that concerned Seth and his involvement and that prompted my call to Seth. It was after that that he sent me an IPRA request. I responded to his request almost immediately (as I did with prior IPRA requests from other people/agencies that were sent directly to me). So Seth probably received it on July 12, 2023. I don't have a copy of what he was sent because I am no longer in possession of the report. As soon as we noticed their were attorney/client communications we deleted it and notified you. We are no longer in possession of what was sent to Seth but it was the "messages" PDF document that you can access through your defense server (it has about 18K pages). No one other than Seth was provided the report because no one else knew of its existence and requested it.

The photos and videos were provided to me on a flash drive that was mailed to me and I am the only person who has viewed those other than the handful of video/photos that were contained in the link we sent to you that Jason Lewis also had access to.

I believe a taint team is used when there is an extraction pursuant to a warrant - that was not the case here. No one from the prosecution team has viewed your communications with your client. We were unknowingly in possession of them and purged the entire file as soon as we realized they were there. As I indicated previously, we will have our expert generate another report that simply removes all messages/photos related to texts from your number (and Bob's or Todd's if they communicated with her over text prior to December 8, 2021). That has not been done yet because our expert is unavailable.

I am happy to communicate to Seth's attorneys that the privileged communications were inadvertently disclosed and the inadvertent disclosure doesn't change the privileged nature of the communications. Let me know if you need any assistance from me in that regard.

Kari

[Quoted text hidden]



Todd Bullion &lt;toddjbullion@gmail.com&gt;

---

**Hannah's cell extraction**

---

Kari Morrissey &lt;ktm@morrisseylewis.com&gt;

Tue, Jul 25, 2023 at 12:43 PM

To: Jason Bowles &lt;jason@bowles-lawfirm.com&gt;, Todd Bullion &lt;toddjbullion@gmail.com&gt;

Cc: "Jason J. Lewis" &lt;jjl@jjllaw.com&gt;

Jason and Todd

It has come to my attention that the second cell extraction I requested contained text messages between you and your client. Immediately upon realizing this I deleted our copies of the extraction and did not read/review the messages between you and your client and confirmed the same with Jason Lewis. Let us know what you want us to do with the copy of the extraction that is on the defense disclosure server. I did not want to remove it without your consent. I have instructed our cell expert to re-disclose the extraction without the attorney/client communications.

When I originally requested Detective Hancock provide the the data from RCFL to our expert she mentioned nothing about the existence of any attorney/client communications or any potential limitations on the scope of the extraction. I believed that the text messages between you and your client were not a part of the extraction. Moreover, I reviewed the signed consent and saw no limitations on the consent. Unfortunately, shortly after receiving the extraction and well before realizing the extraction contained attorney/client communications, I received an IPRA request from Seth Kenney and disclosed the text messages (photos and videos were not disclosed). Mr. Kenney became aware of the existence of the extraction after I called him and asked him a couple of questions about messages between your client and one of her friends that discussed Mr. Kenney's potential involvement. I did this to ensure the integrity of the testimony that I intend to extract during future hearings/trial. I have reached out to Mr. Kenney and requested that he delete his copy of the extraction due to the inadvertent disclosure and the clear privilege of the communications. Mr. Kenney agreed to delete his copy but did state that he provided a copy to his counsel. I have not contacted his counsel at this point but will stipulate to a protective order. I believe very strongly in the attorney/client privilege and will consider anything you propose to suppress the communications. Let me know how you wish to proceed.

Kari



EXHIBIT E

**COOPERATION AGREEMENT**

1. Sarah Zachry hereby agrees to cooperate with Special Prosecutors Kari T. Morrissey and Jason J. Lewis, ("Special Prosecutors") for the First Judicial District prosecuting Hannah Gutierrez, David Halls and Alec Baldwin. Sarah Zachry agrees to provide truthful and complete information and/or testimony known to her concerning the actions of all above-referenced criminal defendants and/or criminal targets, as well as any other individuals involved in the Rust motion picture production ("Rust") in any way related to the pre-production, filming and post-filming events of Rust for which Sarah Zachry has knowledge.

2. In the event Ms. Zachry knowingly offers materially false information, the State will not be bound by the terms of any agreement, and will instead be free to offer any and all statements made by Ms. Zachry in any proceeding, to include, any civil, administrative or criminal proceeding, without limitations set out herein.

2. Ms. Zachry agrees to testify truthfully if called as a witness in any state grand jury investigation and/or any criminal proceeding brought in the First Judicial District of New Mexico by the above-named Special Prosecutors and/or the First Judicial District Attorney's Office.

3. If requested to do so by the Special Prosecutors, and upon reasonable notice to her counsel, Sarah Zachry will provide all documents, records, writings, tangible objects, or materials of any kind which are in her possession, custody, or control and which pertain to an area of inquiry or investigation in this proceeding, within a reasonable time frame.

4. Upon reasonable notice to her counsel, Sarah Zachry will make herself available for questioning to aid in the investigation by the Special Prosecutors.

5. In exchange for the cooperation described above, the Special Prosecutors and the First Judicial District Attorney's Office will forgo criminal prosecution of any and all conduct of

EXHIBIT E

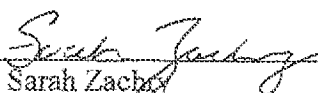
Sarah Zachry, if any such conduct could arise to the level of criminal charges, which is presently known or which is reasonably related to the shooting incident on the set of the Rust movie production to the Special Prosecutors or the First Judicial District Attorney's Office as of the date of the execution of this agreement.



Kari T. Morrissey  
Jason J. Lewis  
Special Prosecutors

October 30, 2023


Date



Sarah Zachry  
Cooperator

10/27/23

Date



Spirit Gaines  
Counsel for Sarah Zachry

10-27-23

Date



Nathan Winger  
Counsel for Sarah Zachry

10-27-23

Date



Mary Carmack-Altweis  
District Attorney  
First Judicial District

10-30-23

Date