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

STATE OF NEW MEXICO,

Plaintiff,

vs.

D-101-CR-2023-00040

HANNAH GUTIERREZ,

Defendant.

REPLY TO STATE'S RESPONSE TO DEFENDANT'S EMERGENCY MOTION FOR NEW TRIAL AND RELEASE

Hannah Gutierrez, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Monnica L. Barreras of the Law Office of Monnica L. Barreras, hereby replies to her motion for a new trial and release, and in further support of this motion states as follows:

The United States and New Mexico Constitutions, through the Fourteenth Amendment, mandate unanimous jury verdicts in criminal cases. U.S. Const. Art. VI; N.M. Const. Art. 2, Sec. 12; *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), (As early as 1898, the Court said that a defendant enjoys 'a constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'"); *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt, and punishment—which are left to the jury."). This requirement of unanimity was not respected in the involuntary manslaughter instructions given to the jury, and the special prosecutor specifically argued in closing for a non-unanimous outcome, regarding the two alternative theories, which were separated by "and/or." This was precisely the

issue on which the New Mexico Supreme Court reversed in the *Taylor* case, which was cited in Ms. Gutierrez Reed's motion for new trial.

This issue was specifically preserved. The special prosecutor misrepresents to this Court the record as to the objections made by Ms. Gutierrez Reed to the jury instructions. The special prosecutor claimed that the only objection made by the defense was as to the use of the word "negligence" as opposed to "recklessness" in the instructions. That is false. It took some time for counsel to obtain the trial tapes and the pertinent portions will be lodged as digital exhibits with this court. Ms. Gutierrez Reed objected in detail as follows to the State's involuntary manslaughter elements instructions:

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At 4:57, So what's the response to she wants it all in one?

(Jason Lewis) So, Your Honor, what we have proposed is to include the count one, count one alternative, and then just a single verdict form. And the reason that we're doing that is we're relying on state versus Godoy (inaudible) 2012 NMCA 084.

05:24 And what that says is where alternative theories are put forth under a single charge, jury unanimity is required only as to the verdict, but not as to any particular period of guilt. And so we believe we're permitted to provide two separate instructions, one for the negligent use, one for the without due caution circumspection, and then the jury just has to agree unanimously under one or both of those theories on the verdict form.

05:55 (Monnica Barreras) Your Honor, in the Goody case does not stand for the proposition that the state gets two separate element instructions or two bites at the apple. What they're asking for here is one element instruction and then another one that has two alternative theories in it. And that's not what Goody says.

06:14 What Goody focused on or Godoy focused on and that's 284 Pacific 3rd 410 that focused on the fact that the jury doesn't have to unanimously say when you're dealing with the same when you're dealing with two distinct acts of the same offense, like it quoted the Nichols case, there were two distinct acts of sexual abuse and those were merely two means of satisfying the same element of the crime charged.

06:49 It didn't require jury unanimity on each act and they didn't have to ask the jury did half of you vote this and half of you vote that because it was the same act. It was sexual assault just on two distinct times. Here you have multiple different acts that they're doing imprecise times. When involuntary manslaughter comes down to the statute and providing a specific act that she did that she willfully did that specific act and there must be jury unanimity on that specific act that she allegedly willfully did.

07:26 So it doesn't stand for separate instructions. **The jury still has to find the specific act unanimously**. They could find it by way of negligent use, an unlawful act, because she like the state proposed endangered the safety of another by handling or using a firearm in a reckless manner. And then you put in there the alternative way. And what we propose is the alternative way what the state's tried to prove this whole time is that she brought live rounds onto set.

07:57 And that should be the act by bringing live rounds onto set. Instead, they're trying to say that they're proposing language that (Judge) you're mixing things. One argument is that they have two instructions. The other one, now you're going into the element of it. Why can't you just put one long instruction that says or in the alternative? (Jason Lewis) Well, I think, Your Honor, the reason that we'd prefer to do it separately is because these are separate elements.

08:31 The element of negligent use of a firearm and its associated definitions of firearm and the definition of negligence or recklessness is separate and apart from our second theory, which

is that she acted without due caution and circumspection. I think that the facts of each are so different that requiring the jurors to find unanimity on I think it would lead to juror confusion.

13:41 (Monnica Barreras) Okay. So one thing with their alternative theories is it looks like in cases involving multiple alternative elements, there needs to be a cautionary instruction about let's see. Unanimity. Yeah, about jury unanimity, that they have to unanimously find that she did one specific act.

14:08 That's from State versus Dobbs 100 New Mexico 60 that's cited within the Godoy case that they raised. The court says while it would be advisable in cases involving multiple alternative elements to have cautionary instruction, in that case, in Godoy, they didn't speculate about whether the jury reached a nonunanimous verdict, and there's no indication that they did.

14:34 But what we're asking is a cautionary instruction requiring the jury to have a unanimous verdict on the specific willful act that they're finding a verdict on.

15:05(Judge) I'm denying your objection.

Thus, Ms. Gutierrez Reed specifically preserved unanimity objections, where there are multiple alleged acts, to the involuntary manslaughter instructions as given. This objection included that the alternative clauses allowed the jury to come to a non unanimous verdict on which "act" may have been committed. The Court denied these objections. The special prosecutor then "doubled down" on the error and specifically argued in closing that the jury could split their findings between the various acts, saying that 6 of you could find this act and 6 the other, and you don't have to be unanimous. This is the very premise and principle of error addressed by the Supreme Court in the *Taylor* opinion attached to the motion.

The special prosecutor attempts to distinguish *Taylor* by saying that there were four alternative clauses in that case and only two here, so this case was less confusing in essence. This

isn't the holding and principle announced in *Taylor*. It is broader than the number of clauses, whether that be two or ten.

Justice Vigil, writing for the Taylor court stated:

> {2} ... The confusion and misdirection stem from the use of a single and/or connector to separate and join no fewer than four distinct propositions for the jury's consideration. The term and/or has proved singularly unsuited to formulating clear and effective jury instructions, to the degree that our trial courts would be well-served to avoid its use in jury instructions altogether. The underlying jury instructions' use-or, more accurately, misuse—of the and/or connector requires this Court to reverse Defendants' reckless child abuse convictions.
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> ...
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> {9}...Specifically, Defendants argue that the instruction's listing of the elements of essential conduct with an and/or conjunction provided for alternative ways for the jury to find that Defendants committed child abuse without requiring the jury to unanimously agree on any of those alternatives. Applying a de novo standard of review, we agree with Defendants.
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> ...
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> {12}As we explain next, the presence of and/or in the all-important conduct element of the essential-elements instructions confused and misdirected the jury and allowed it to make a finding of guilt on a legally inadequate basis.
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> {13} More than seventy-five years ago, this Court criticized the use of and/or in the context of jury instructions:
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> > [The highly objectionable phrase "and/or" . . . has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all in instructions to a jury. Instructions are intended to assist jurors in applying the law to the facts, and trial judges should put them in as simple language as possible, and not confuse them with this linguistic abomination.

State v. Smith, 1947-NMSC-048, 1 7-8, 51 N.M. 328, 184 P.2d 301 (involving the misuse of and/or in jury instructions that defined the essential elements of second-degree murder), quoted approvingly in Bryan A. Garner, Garner's Dictionary of Legal Usage, 57 (3d ed. 2011). And over the years other courts have joined this criticism. See, e.g., Garzon v. State, 980 So. 2d 1038, 1043-45 (Fla. 2008) ("comdemn[ingl" the unobjected-to use of the and/or conjunction between names of codefendants in jury instructions that set out the elements to be proven, but holding that the error was not fundamental); State v. Gonzalez, 130 A.3d 1250, 1255 5 (N.J. Super. Ct. App. Div. 2016) (concluding that the trial court's repeated use of the imprecise term and/or in its jury instructions was "so confusing and misleading as to engender great doubt about whether the jury was unanimous with

> respect to some part or all aspects of its verdict or whether the jury may have convicted the defendant by finding the presence of less than all the elements the prosecution was required to prove"); Commonwealth v. Johnson, 700 N.E.2d 270, 272-73 (Mass. App. Ct. 1998) (setting aside a verdict convicting the defendant of violating a domestic protective order based on an erroneous jury instruction that permitted a conviction upon a finding "that the defendant violated the order by abusing [the victim], . . . and/or [by] contacting [her]," where contact was not "a restraint" prohibited by the order (alterations and omission in original).
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> . . .
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> {16} The jury was required to parse the complexities created by the presence of multiple alternative propositions framed by a single and/or connector ... This violated our teaching in Consaul, 2014-NMSC-030, 1 23, that "[when two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred, then the jury must make an informed an unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished."

Accordingly, Justice Vigil announced broader principles and premises in *Taylor* regarding the confusing use of and/or as a connector for multiple acts, and the need to ensure that the jury is unanimous as to the particular act alleged to have been committed. The jury instructions here invited the jury to come to a non-unanimous verdict, picking and choosing from a "smorgasbord" of different and varied acts to achieve a conviction. This is precisely what the special prosecutor invited the jury at trial to do in her closing arguments. This is precisely what cannot be done in our criminal justice system where a person's liberty is at stake, as the Supreme Court held in *Taylor*.

Respectfully submitted,

/s/ Jason Bowles
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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 27th day of March, 2024, to the counsel listed below:

Kari Morrisey, Special Prosecutor
Jason Lewis, Special Prosecutor

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm