

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

**STATE OF NEW MEXICO,
Plaintiff,**

No. D-101-CR-2024-0013

vs.

Judge Mary Marlowe Sommer

**ALEXANDER RAE BALDWIN,
Defendant.**

**STATE OF NEW MEXICO'S MOTION FOR *IN CAMERA* INSPECTION
OF JOINT DEFENSE AGREEMENT BETWEEN
HANNAH GUTIERREZ REED AND ALEXANDER BALDWIN**

COMES NOW the State of New Mexico by and through Special Prosecutors Kari T. Morrisey and Erlinda O. Johnson and hereby respectfully moves this Court for an *in camera* inspection of any joint defense agreement between Defendant Alexander Baldwin and Co-Defendant Hannah Gutierrez Reed, as referenced in Counsel Jason Bowles' motion to quash subpoena. The State further requests that the Court require any such agreement to: (1) be in writing and signed by the participating defendants and defense counsel; (2) contain language that ensures that the agreement does not create (or waives) any confidentiality obligations or attorney-client privilege between the defendants and the attorney who is not his or her counsel. In support of the motion the State submits the following.

INTRODUCTION

On October 21, 2021, during the filming of the movie Rust, Defendant Hannah Gutierrez Reed, the film's armorer, loaded a firearm, in part, with a live bullet. That firearm was then given to Defendant Alexander Rae Baldwin who, in turn, failed to inspect the firearm with Ms. Gutierrez

Reed. Mr. Baldwin subsequently pointed the gun at Halyna Hutchins, cocked the hammer and pulled the trigger, shooting and mortally wounding Halyna Hutchins.

On December 1, 2021, Mr. Baldwin, without counsel, called the office of Attorney Jason Bowles, counsel for Ms. Gutierrez. During that call, Mr. Baldwin spoke with Mr. Bowles' assistant. During that conversation, Mr. Baldwin essentially stated that he would agree to publicly state that during the filming of *Rust*, he never had any issues with Ms. Gutierrez and that he did not believe she was unsafe. According to Mr. Bowles' description of Mr. Baldwin's call, Mr. Baldwin further stated that in exchange for his public comments that Ms. Gutierrez had done a good job as armorer, Mr. Baldwin asked that Ms. Gutierrez and her team not "slam" him in public about the statements Mr. Baldwin had made publicly that he did not pull the trigger.

On January 31, 2023, Defendant Hannah Gutierrez Reed was charged by way of criminal information with involuntary manslaughter in connection with her part in the October 21, 2021, killing of Halyna Hutchins. On June 22, 2023, the State filed an amended criminal information. On August 4, 2023, Defendant Gutierrez Reed filed a waiver of preliminary hearing. On February 21, 2024, Ms. Gutierrez Reed proceeded to trial. On March 8, 2024, she was found guilty of involuntary manslaughter. On April 15, 2024, Ms. Gutierrez was sentenced to a term of 18 months' in the custody of the New Mexico Department of Corrections. Ms. Gutierrez Reed has a right to appeal her conviction and sentence. As such she continues to enjoy her rights pursuant to the Fifth Amendment to the United States and New Mexico Constitutions. *See Taylor v. Liefert*, 568 N.W. 2d 456 (Minn. App. 1997); *see also United States v. Duchi*, 944 F. 2d 391, 394 (8th Cir. 1991).

On January 19, 2024, a grand jury sitting in the First Judicial District issued a one count indictment against the Defendant Alexander Rae Baldwin, charging one count of involuntary manslaughter (Negligent Use of a Firearm), in violation of NMSA 1978 §30-2-3(B) (1994) or in the

alternative Involuntary Manslaughter (without due caution or circumspection). On January 31, 2024, the defendant filed a waiver of arraignment. Mr. Baldwin, through counsel, has listed defendant Hannah Gutierrez Reed as a witness for Mr. Baldwin.

Recently, the State of New Mexico issued a subpoena duces tecum to Attorney Jason Bowles, seeking the production of the information and the statements made by Mr. Baldwin to Mr. Bowles and his staff on December 1, 2021, and thereafter. Mr. Bowles has since moved to quash the subpoena, arguing the existence of a joint defense agreement between Mr. Baldwin, his counsel, Ms. Gutierrez, and her counsel.

Since Ms. Gutierrez continues to enjoy Constitutional protections as she has the right to appeal, the State respectfully requests this Court inspect, *in camera*, any joint defense agreement to ensure that (1) the agreement is and was, in December 2021, reduced to writing and signed by all participating defendants and defense counsel; (2) it contains language that ensures that the agreement does not create (or ensures that it waives) any fiduciary duty, duty of loyalty, confidentiality obligation, or attorney-client privilege between any defendant and any attorney who is not his or her court-appointed counsel; and (3) provides a mechanism for withdrawal from the agreement.

ARGUMENT

According to counsel for Ms. Gutierrez, a joint defense agreement or “common interest” agreement exists between Mr. Baldwin, his attorneys, Ms. Gutierrez and her attorney. If that is the case, the State is concerned with issues that relate to the effective assistance of counsel as set forth in *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000) (*per curiam*). In *Henke*, the Federal Ninth Circuit Court of Appeals reversed convictions on the basis that the defendants had been deprived of effective assistance of counsel.

In that case, three defendants entered into a joint defense agreement and thereafter shared privileged information. Shortly before trial, one of the defendants entered into a cooperation agreement with the prosecution, which required him to testify against his co-defendants. Counsel for the other defendants then moved for a mistrial and to withdraw, arguing that they could not cross-examine the cooperator because what they wanted to ask him came from joint defense meetings that were privileged. The district court denied the motion to withdraw. *Id.* at 636-38. Defense counsel conducted no cross-examination of the cooperator so as not to run afoul of pertinent ethical rules. *Id.* at 637. The Ninth Circuit reversed, concluding that the defendants had been deprived of effective assistance of counsel because their attorneys could not effectively and ethically cross examine the cooperator. *Id.* at 637-38.

“[T]he Sixth Amendment right to have the effective assistance of counsel encompasses the right to have counsel untainted by conflicts of interest.” *United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003) (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). “When co-defendants enter into a joint defense agreement ... each defendant retains his own attorney,” and “confidential communications made during joint defense strategy sessions are privileged.” *Almeida*, 341 F.3d at 1323 (citing *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) and *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)).

It is important to note, however, that “[a] joint defense agreement does not create an attorney-client relationship between an attorney and the co-defendant.” *United States v. Exec. Recycling, Inc.*, 908 F. Supp. 2d 1156, 1159–60 (D. Colo. 2012) (citing *United States v. Stepney*, 246 F. Supp. 2d 1069, 1080 (N.D. Cal. 2003)). “Thus, an attorney owes no duty of loyalty to her client's co-defendant.” *Id.* at 1160 (citing *Almeida*, 341 F.3d at 1323). The Court in *Stepney*,

recognized that “joint defense agreements impose an ethical duty of confidentiality on participating attorneys, presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal.” *United States v. Stepney*, 246 F. Supp. 2d 1069, 1077 (N.D. Cal. 2003) (citing *United States v. Henke*, 222 F.3d 633, 643 (9th Cir. 2000)).

“Courts have routinely intervened - prior to any controversy arising - where the circumstances of a criminal defendant’s representation raises the potential for conflict of interest during the course of the proceedings, even before intervention is required by statutory or constitutional rule.” *Stepney*, 246 F. Supp. at 1077. Out of an abundance of caution, because it is unclear what potential conflicts might exist or arise as a result of a joint defense agreement and because prudence requires, this Court must examine, *in camera*, the joint defense agreement herein if one truly exists.

In explaining its order compelling the production *in camera* of any joint defense agreements, the *Stepney* court reasoned:

[J]oint defense agreements impose an ethical duty of confidentiality on participating attorneys, presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal. When a party to a joint defense agreement decides to cooperate with the government, the potential for disclosure of confidential information also threatens other defendants’ Sixth Amendment rights. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Courts also have an independent interest in protecting a fairly-rendered verdict from trial tactics that may be designed to generate issues on appeal. *Given the high potential for mischief*, courts are well justified in inquiring into joint defense agreements *before problems arise*.

Id. at 1077-78 (emphasis added). Following its *in camera* review, the *Stepney* court enumerated two problematic areas contained in the agreement. First, the agreement purport[ed] to create a duty of loyalty on the part of signing attorneys that extends to all signing defendants. *Id.* at 1079. Second, the agreement [did] not contain workable withdrawal provisions that adequately avoid the possibility of disqualification on the eve of trial, or even during trial. *Id.* In ruling that the joint defense agreement could not impose such a broad duty of loyalty, the court listed several adverse consequences that conceivably could arise, each of which would threaten the integrity of the judicial process. *See id.* at 1081-83.

As it relates to this case for example, if defendant Gutierrez Reed were to be a party to an agreement with the prosecution and testified against Mr. Baldwin, the lawyers for Mr. Baldwin would be forbidden from cross-examining her. *See generally id.* at 1083. Similarly, lawyers who are parties to an agreement that imposes upon them a duty of loyalty extending to both defendants would be forbidden from putting on a defense for their client that conflicted in any way with the defense set forth by the other defendant. *See id.*

Ultimately, pursuant to *Stepney*, courts must require the following when joint defense agreements exist:

- (1) Any joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted *in camera* to the court for review and approval.
- (2) Each joint defense agreement submitted must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.
- (3) Each joint defense agreement must contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any material or other information contributed by such client

during their joint defense.

(4) Each joint defense agreement must explicitly allow withdrawal upon notice to the other defendants.

See id. at 1086. To avoid the result in *Henke*, the State requests that this Court adopt the protocol set forth in *Stepney*. While it is the right of the defendants to decide whether to enter into a joint defense agreement, it is for the Court to ensure that any such agreement does not imperil the orderly and just litigation of this case.

WHEREFORE, for the foregoing reasons, the State respectfully requests that the Court order the production of any joint defense agreement for an *in camera* inspection and thereafter require the following:

- (1) Any joint defense agreement must be committed to writing, signed by defendants and their attorneys and submitted *in camera* to the Court for review and approval, and any joint defense meetings held prior to such approval did not create any attorney-client relationship or any duty of loyalty.
- (2) Any joint defense agreement must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a fiduciary duty or duty of loyalty.
- (3) Any joint defense agreement must contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any material or other information contributed by that testifying defendant during their joint defense.
- (4) Any joint defense agreement must explicitly allow withdrawal upon notice to the other defendant.

Counsel for Mr. Baldwin were contacted for their position on the motion for this Court to inspect any joint defense agreement *in camera* but as of the filing of this motion a response had not been received.

Respectfully Submitted,

/s/ Kari T. Morrissey

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I hereby certify that a true and accurate
Copy of the foregoing was provided to
Counsel for the defendant via e-mail
This 3d day of May 2024.

/s/ Erlinda O. Johnson

Erlinda O. Johnson