STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

PLAINTIFF,

VS.

ALEXANDER RAE BALDWIN III,

DEFENDANT.

No. D-0101-CR-2024-0013
Judge Mary Marlowe Sommer

DEFENDANT ALEC BALDWIN'S EXPEDITED MOTION FOR RELIEF FOR PROSECUTORIAL MISCONDUCT UNDER RULE 5-501 NMRA AND *BRADY V. MARYLAND*

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PRELIMINARY STATEMENT

Prosecutors for the State of New Mexico have built their entire case around the unproven hypothesis that the gun Baldwin was given on the set of *Rust* was properly functioning and could not have gone off unless he pulled the trigger. This theory, of course, remains contested, but the State has pursued it with such certainty and commitment in the months leading up to trial that it has essentially adopted the theory as fact. In doing so, the State has consistently pointed to statements from its two experts, Lucien and Michael Haag, concluding that (1) the "fatal incident was the consequence of the hammer being manually retracted to its fully rearward and cocked position followed, at some point, by the pull or rearward depression of the trigger," and (2) the gun "functioned properly and as designed and intended by the manufacturer." The first conclusion is based on the Haags' initial examination of the firearm performed on July 3, 2023, the results of which were published in a report dated August 2, 2023 (the "First Haag Report"). The second conclusion is based on a second examination that was performed on August 24, 2023, the results of which were published in two separate reports, dated August 26, 2023 (the "Second Haag Report"), and August 31, 2023 (the "Third Haag Report"), respectively. The Third Haag Report also found that the firearm contained unexplained toolmarks on the working surface and sides of the evidence trigger/sear and that, contrary to the State's numerous representations to Your Honor, (1) it was "unlikely . . . that these toolmarks are the result of the damage incurred during the FBI's impact testing," and (2) the toolmarks "do not appear to be original manufacturing marks or use and abuse toolmarks based on [their] irregular orientation."

The State had a continuing obligation to promptly disclose all three reports. What it did instead was this:

- It immediately disclosed the First Haag Report, which generally supports the State's theory of the case.

- It told grand jurors about the conclusions of the Second Haag Report (without mentioning the report itself), which also generally support the State's theory of the case.
- In April 2024, when Baldwin learned about the Second Haag Report, which had never been disclosed, it immediately provided Baldwin with a copy—*without* mentioning or disclosing the Third Haag Report.
- On May 21, 2024, when Baldwin learned about the Third Haag Report—which ***contradicts*** the State's theories—it finally disclosed that report as well.

In sum, in August of last year, the State received three reports from its firearm experts. Two of the reports tend to support the State's theory of the case; the third report does not. The State immediately disclosed the first report, held onto the second report (while disclosing its core conclusions to the grand jury and the Court), and *withheld the third report in full* until Baldwin inadvertently learned of its existence six weeks before trial.

The State's pattern of withholding information from Baldwin started at the outset of its investigation. During Baldwin's first interview at the SFSO, where he spoke freely for over an hour to assist law enforcement with its investigation, investigators waited until the *end* of his interview to tell him that Halyna Hutchins had died. The entire time he was speaking with investigators—before he knew that a live round had somehow made its way onto the movie set—he believed Hutchins would recover from whatever injuries she had sustained. The State's approach—hide the ball at all costs—continues nearly three years later. In the past ten weeks alone, the State has disclosed ***thousands*** of files, including ***over 150,000 pages*** of documents and ***dozens of gigabytes*** worth of data. Virtually all of these files have been in the State's possession for *months*—and in many cases *over a year*. Many of them contain critical evidence that is favorable to Baldwin's defense and that fundamentally reshapes the way Baldwin would have prepared for trial, such as emails from one of the State's experts that contradicted his grand jury testimony and the State's theory about the firearm.

Even more troubling than these late disclosures, while the State has been quick to *disclose* documents that tend to *support* its theory of the case (*e.g.*, reports from its own expert that purport to demonstrate the firearm could not have discharged unless Baldwin pulled the trigger), it has continually *withheld* documents that *undermine* its theory of the case (*e.g.*, an eight-month-old report from the *same* expert casting doubt on his previous conclusions, which lie at the heart of the State's theory of guilt).

The State's flagrant disregard for its discovery obligations violates Baldwin's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), as well as the more stringent disclosure requirements of New Mexico law. *See, e.g.*, *State v. Allison*, 2000-NMSC-027, 129 N.M. 566. Whether the State's misconduct was intentional or purported to be just careless, severe remedies are warranted. *See State v. Davidson*, No. A-1-CA-40209, 2024 WL 2889839, at *5 (N.M. Ct. App. May 31, 2024) ("Our Supreme Court . . . does not attempt to limit the use of sanctions, including the sanction of dismissal with prejudice, when the state either breached some duty or intentionally deprived the defendant of evidence, or where material evidence has been suppressed and the suppression of this evidence prejudiced the defendant.").

In light of the facts and arguments set forth below, Baldwin respectfully requests the following relief:

(1) An order dismissing the indictment with prejudice;

(2) In the alternative, if the Court declines to dismiss the indictment under the legal framework outlined below (which requires dismissal), an order granting leave for supplemental briefing on Baldwin's Motion to Dismiss the Grand Jury Indictment (filed March 14, 2014) and dismissal under the legal framework applicable to that motion; or

(3) At minimum, to reduce the prejudice that the State's misconduct has caused:

    (a) Preclusion of all testimony, evidence, and argument related to the State's contention that Baldwin must have pulled the trigger;

(b) Immediate disclosure of the State's final witness list so that Baldwin can properly test the evidence and witnesses the State will offer at trial;

(c) Immediate disclosure of all outstanding document productions, including answers to all of Baldwin's questions relating to the State's investigation, with redactions submitted to the Court for *in camera* review as appropriate; and

(d) An order requiring the State to provide a log of all communications between or among any member of the Santa Fe Sheriff's Office, District Attorney's Office, Special Prosecutor's Office, and any witness who has contacted or been contacted by any of the foregoing entities.

The State's repeated violations of its sacrosanct duty of disclosure warrants dismissal—which is exactly what other courts have done under analogous circumstances. At a minimum, Baldwin is entitled to *at least* the remedies articulated above, which are narrowly tailored to reduce the prejudice caused by the State's misconduct and to attempt to ensure a fair trial.

The list of the State's discovery violations is long. Although the justice system does not demand perfection, it does demand fairness and transparency. How is it fair that the State withheld two reports about the gun from its most critical expert witness in the case, especially when those reports are about the one issue the State has made a central theme of this prosecution: that the gun wasn't modified and Baldwin pulled the trigger? How is it fair that the State dumped over 150,000 pages of documents on Baldwin at the end of the pre-trial interview process? How is it fair that the State withheld its emails with another State expert who has contradicted the State's theory and that expert's grand jury testimony in this case? The State has withheld document after document, and it had no excuse for doing so; the State's investigation and prosecution has been ongoing for almost three years. The State's conduct has caused severe prejudice, at the last minute before trial. The Court should grant Baldwin's motion.

FACTUAL BACKGROUND

Baldwin will not recount each of the State's discovery violations. Nor, for purposes of this motion, does he need to, as the misconduct outlined below is more than sufficient to warrant the relief Baldwin seeks. The facts relevant to this motion are set forth below.

A. The State's Late Disclosure of Evidence Related to the Firearm

The accident involving the firearm occurred on October 21, 2021. Six months later, the SFSO requested that the FBI test the revolver. The SFSO's expressed purpose for doing so was to prove that Baldwin pulled the trigger, which remains contested. *See* Ex. L ("Defendant Alec Baldwin's Motion To Dismiss The Indictment With Prejudice Based On The State's Destruction Of Evidence" (May 6, 2024)), at 7. The SFSO directed the FBI to perform an "[e]nhanced test" to determine whether the firearm would fire without pressing the trigger. *Id.* The FBI informed the State that the "enhanced" testing—which involves striking the firearm on all planes with a rawhide mallet—would "alter the firearm" such that it would "no longer be in the same physical condition that it was seized in" following the testing. *Id.* at 7-8. Despite Baldwin's repeated statements that he did not pull the trigger, the FBI waited until *after* it had performed this destructive testing to take the firearm apart and examine it for any signs of modification or damage that might explain how it had discharged. *Id.* at 8-9.[1]

[1] The State's destruction of the firearm is the subject of a dispositive motion that Baldwin submitted on May 6, 2024, the last day to file dispositive motions under the Court's scheduling order. *See* Ex. L. That motion is set for argument on June 21, 2024. However, virtually all of the firearm-related evidence described below was withheld by the State until *after* the dispositive motion deadline, and much of it was not disclosed until after the pre-trial interview period had ended. Because many of the facts embodied in this motion are relevant to the arguments presented in Baldwin's May 6 motion to dismiss based on the State's destruction of evidence, Baldwin respectfully submits that those facts should be considered by the Court in ruling on any issues arising from the State's destruction of the firearm. The facts relevant to that motion are identified in an Addendum to Defendant Alec Baldwin's Motion to Dismiss The Indictment with Prejudice Based on the State's Destruction of Evidence, filed concurrently with this motion.

On May 6, 2024, the same day that the deadline to add new witnesses terminated, the State disclosed email communications with its designated firearm safety expert, Bryan Carpenter, which took place more than a year earlier. From the time the emails were exchanged in April 2023 through numerous interactions with counsel, the Court, and the grand jury, the State did not disclose them. In one of the emails, Special Prosecutor Morrissey points Carpenter to photographs that, in her words, show the "stark difference" between the hammer notches on the gun Baldwin was given on the set of *Rust* and the notches that appear on a "brand new hammer from the exact same gun." *See* Ex. G. In response, Carpenter stated that he "cannot see any reason that's functionally necessary or does not compromise the safety integrity and/or the operation of the gun." *Id.* Carpenter followed up the next day, stating, "Though I see no reason (operationally) why that modification exists, it remains to be seen definitively if it compromised the safety and function of the revolver and who/where/why it was preformed [sic] in the first place." Ex. H. Carpenter's statements undermine the State's contentions that the firearm functioned properly and shows no signs of modifications. *See, e.g.*, Ex. M ("State's Response to Defendant's Motion to Dismiss the Indictment" (April 5, 2024)), at 18 ("The defendant simply doesn't have a leg to stand on concerning his claim that the hammer of the gun was modified.").

Around this same time, the State retained two firearm experts, Lucien C. Haag and Michael G. Haag, to interpret the FBI's findings and conduct further analysis. In a report dated August 2, 2023, based on the Haags' initial examination of the firearm, the Haags argued that the "fatal incident was the consequence of the hammer being manually retracted to its fully rearward and cocked position followed, at some point, by the pull or rearward depression of the trigger." Ex. A ("First Haag Report"), at 26. On August 24, 2023, the Haags traveled to Santa Fe at the State's

request to perform a second examination of the firearm.[2] The Haags prepared a supplemental report, dated August 26, 2023, concluding that the revolver—which had been destroyed by the FBI—"functioned properly and as designed and intended by the manufacturer." Ex. B ("Second Haag Report").

The First Haag Report was promptly disclosed to Baldwin. The Second Haag Report was not. Instead, Baldwin first learned of the Second Haag Report roughly seven months after it was prepared, on April 29, 2024, during a pretrial interview of Lucien Haag in which he referred to a "supplemental report" that was prepared in connection with the examination that occurred in Morrissey's presence on August 24, 2023. *See* Ex. O at 44:14-18 (COUNSEL: "[T]he report I have, as I understand it, does not address the part of the testing where you guys put the broken evidence hammer back in to test whether it would hold that full-cock notch. Is that correct in your recollection or am I missing it in the report?" HAAG: "No, I think that was – you know, I need to look at my supplemental report."). At that point in the interview, when it became clear that Baldwin's counsel had never seen the report Haag was referring to, the State began to look for the Second Haag Report on its server and quickly located it "under Luke Haag's file." *Id.* at 45:23-46:15. Upon locating the report, Morrissey stated:

> I see it in our server, but . . . we don't get into the defense disclosure server because we don't want a bunch of people monkeying around with things for fear that something would not appear there. Let me do a little bit of more research on when a request was generated to have this added to the defense share, and I'll get back to

[2] Baldwin had no knowledge of the Haags' second examination of the firearm—in which Morrissey evidently participated—until February 2024, when Baldwin first obtained recordings of the grand jury proceedings. *See* Ex. N at 132:6-18 (MORRISSEY: "And after you generated [the First Haag Report], were you asked to do a small amount of additional testing on the gun?" HAAG: "Yes, because ***you*** had a very good idea." MORRISSEY: "Thank you. So where – where did ***we*** do that testing?" HAAG: "***We*** did that – a follow-up set of exams at the Santa Fe County Sheriff's Office evidence storage unit." MORRISSEY: "And did ***we*** create some videos there?" HAAG: "***We*** did.") (emphasis added).

> you. . . but I see it, so what I'm going to do is I'm going to email it to you to make things easier.

Id. at 46:22-47:6.[3]

One would expect that in the process of pulling and sending the Second Haag Report, which was saved "under Luke Haag's file," the State would also have sent the Third Haag Report, which the State received from the Haags just five days after receiving the Second Haag Report. *See* Ex. E. At the very least, one would think Morrissey would have produced the Third Haag Report while she was supposedly "do[ing] a little bit of more research" on why the Second Haag Report hadn't yet been added to the "defense share" (*i.e.*, the shared online drive through which the State had been making its disclosures). Moreover, the State should have known that if the Second Haag Report had never been disclosed to Baldwin, chances are the Third Haag Report hadn't been disclosed either—indeed, Baldwin's counsel made that unequivocally clear during Lucien Haag's April 29 pre-trial interview. *See* Ex. O at 43:25-44:3 ("So I have a report from you dated August 2, 2023 . . . *Is there any other report that you've prepared in this case?*"); *id.* at 44:5-6 ("*Have you been asked to prepare additional reports?*"); *id.* at 45:13-15 ("*Do you know if you're going to write up any supplement or addition to this report based on that testing?*"). But after learning of its failure to disclose the Second Haag Report and being told that Baldwin was not aware of any other reports, the State did nothing to confirm whether it had disclosed the Third Haag Report.

Three weeks later, on May 21, 2024, Baldwin conducted a pretrial interview of Lucien Haag's son, Michael Haag, to prepare for his anticipated testimony at trial. During the interview, Haag referenced *multiple* "supplemental reports," at which point Baldwin's counsel first learned about the Third Haag Report. *See* Ex. D (Transcript of 5/21/24 Interview of M. Haag) at 31:23-

[3] A video of the interaction reflected in Exhibit O is included with this submission. *See* Ex. Y.

33:21. The Third Haag Report appears to have been based on the same evidentiary viewing that Morrissey organized and attended on August 24, 2023. *Compare* Ex. B, at 2 ("On August 24, 2023, this writer traveled to the Santa Fe County Sheriff's Property Facility and met with Detective Hancock at approximately 9:15am at which time she produced the inoperative evidence Pietta revolver"), *with* Ex. C, at 2 ("On August 24, 2023, this writer traveled to the Santa Fe County Sheriff's Property Facility and met with Detective Hancock at which time she produced SFSO Item 1, the previously-examined Pietta revolver"); *see also* Ex. N at 132:6-18.

The difference between the State's Second Haag Report and the Third Haag Report, however, is that while the Second Haag Report generally supports the State's theories about the firearm, the Third Haag Report does not. The report, dated August 31, 2023, sought to answer the question of "whether the observed damage on the hammer's full-cock notch was the result of the FBl's testing to the point of component failure, or if this damage could have been pre-existing (present at the time of the incident on the Rust set)." Ex. C, at 2. Specifically, the purpose of the report was to identify the origin of certain "unexplained toolmarks present on the working surface and sides of the evidence trigger/sear." Ex. C, at 2. The report concludes that it is "unlikely . . . that these toolmarks are the result of the damage incurred during the FBI's impact testing" and that they "do not appear to be original manufacturing marks or use and abuse toolmarks based on [their] irregular orientation"—undermining the Haags' earlier conclusions that the revolver "functioned properly and as designed and intended by the manufacturer." *Compare id. with* Ex. B at 2; *see also* Ex. D at 56:4-9 (admitting the Third Haag Report shows that "while there are marks there that don't conform to what we would expect for manufacturing marks, because the impactive testing

and the damage, there's no way to necessarily know what those marks are from," and you "can't know a hundred percent either way").[4]

Despite the State's awareness of these admissions and their impact on the credibility of the Haags' previous conclusions, the State continued to represent to the Court—without having disclosed the Haags' statements to the contrary—that forensic testing "[p]redictably . . . concluded that the trigger of the gun had to be pulled for the gun to have discharged on October 21, 2021 and the alleged modification of the hammer was simply damage caused when the FBI struck the hammer with the mallet so many times that it finally damaged the hammer and sear." *See* Ex. M, at 17; *see also id.*, at 18 ("The defendant simply doesn't have a leg to stand on concerning his claim that the hammer of the gun was modified."); Ex. U ("State's Response to Defendant's Motion to Dismiss the Indictment with Prejudice Based on the State's Destruction of Evidence") (May 21, 2024), at 5 ("The notion that defendant's gun had been modified and not working properly prior to its seizure by law enforcement was . . . refuted by firearms and toolmark forensic experts."). Morrissey made these representations in a brief submitted to this Court even though

[4] The State has repeatedly failed to disclose expert materials until during or after interviews with the relevant witnesses, in violation of its disclosure obligations. For example, the State did not disclose statements by and materials relied upon by State firearms expert, Bryce Ziegler, and State DNA expert, Jerilyn Conway, which the defense only learned about through their pretrial interviews at the end of April. Similarly, on June 6, 2024, the State disclosed communications between Special Prosecutor Morrissey and EMF, the importer of the Pietta revolver in evidence. The disclosure took place after Baldwin's counsel interviewed Pietta, whom the State intends to call as an expert. Another State's expert, Michael Primeau, sat for a pretrial interview on April 26, 2024, without having disclosed his supplemental expert report—which the State evidently told him was fine to withhold until after the interview. *See* Ex. T (COUNSEL: "Your supplemental report, have you produced that?" PRIMEAU: "I have not. Ms. Morrissey advised that I had maybe a week to produce that."). Another State's expert, Paul Jordan, failed to disclose the existence of his own statement (a report he had prepared for the Screen Actor's Guild in June 2023) until his pretrial interview, which took place on May 23, 2024. And despite an agreement from Jordan and the State that they would provide the report to Baldwin's counsel, it was not disclosed until nearly three weeks later—after the pretrial interview period had ended and less than a month before trial.

she apparently *participated* in the examination that gave rise to her experts' undisclosed statements to the contrary.[5] *See* Ex. N at 132:6-18. Meanwhile, the State has asserted, over and over, that Baldwin "violated decades-old guns safety and set safety standards by pointing the gun at a person, cocking it, and pulling the trigger." No. D-101-CR-2024-0013, "State's Response to Alexander Baldwin's Motion to Dismiss the Indictment for Failure to Allege a Criminal Offense" (May 21, 2024), at 14.

The State withheld the Third Haag Report for almost nine months, even though it was received by the State *the same day* it was finalized. And it wasn't until June 6, 2024—two weeks *after* the State finally disclosed the report itself and *after* the pretrial interview period had ended—that the State disclosed additional communications with the Haags demonstrating that the Haags prepared the report on their own initiative because they felt *obligated* to disclose their inconsistent findings. Specifically, in his cover email to the State attaching the report, Lucien Haag wrote:

> Mike and I agreed that something needed to be memorialized regarding the odd toolmarks on the broken off sear tip from the evidence trigger. So that's how this Supplemental Report starts. Mainly because anyone with serious knowledge of the working of single-action revolvers upon seeing this might incorrectly assume I (we) did not see it. And you can quickly see where such presumed oversight would go from there.

Ex. E (8/31/23 email from L. Haag). The State's only explanation for why it did not disclose the report sooner came from Special Prosecutor Morrissey, who stated, "The failure to disclose the 8/31 supplemental report was mine. The day it was received I intended to forward it for disclosure but I can see from my email that I did not." Ex. F (5/23/24 email from K. Morrissey). Morrissey did not explain why, if, in fact, her failure to disclose the Third Haag Report was a simple

[5] Baldwin now knows that the conclusions of the Third Haag Report were concealed from the grand jury as well—even while Morrissey elicited the *favorable* conclusions of the Second Haag Report, which were based on the *same* examination (which Morrissey apparently attended) that generated the conclusions contained in the Third Haag Report. *See* Ex. N at 132:6-18.

oversight, she did not disclose it when she disclosed the Second Haag Report—especially when the State was on notice that Baldwin only knew about the First Haag Report. Or why it took until June 6, 2024, for the State to disclose roughly 200 files from the Haags, almost all of them dating back to 2023, including previously undisclosed emails relating to the August 31 report.

B. The State's Late Disclosure of Other *Brady* Materials

But that's not all. In yet another disturbing development, on May 23, 2024, the State disclosed dozens of audio recordings of interviews that the State's investigator, Connor Rice (who has worked for Morrissey for over a decade), had conducted over the past year. *See* Ex. F at 1-2. Special Prosecutor Morrissey claimed that only "five interviews" were "relevant to the case against Mr. Baldwin" and the rest were "unrelated," despite admitting that the "unrelated" interviews "specifically related to the involuntary manslaughter case against Mr. Gutierrez or the pending felony case against Ms. Gutierrez for bringing a firearm into a liquor establishment" (*id.* at 1)—*i.e.*, that they were inherently related to Baldwin's case. In any event, Morrissey described the "five interviews" that she claimed *were* relevant to Baldwin's case as follows:

> The interviews of Andy Graham, Cynthia Neidland and Raleigh Wilson were in Mr. Rice's possession but not provided for disclosure until this week. *He has been notified that such a delay is unacceptable.* The interview of Kristin Gonzales was shared with me by Mr. Rice on March 29, 2024 but it was diverted into my spam folder for some reason I did not see it. We discovered this because I had Mr. Rice send a test dropbox share to my email yesterday and it went into my spam folder. The interview of Ms. Keuhn [sic] was shared on February 18 by Mr. Rice to Mr. Taub and we are unsure why it was never uploaded to the server.

Ex. F (emphasis added). In the recording of Rice's 25-minute interview of Andy Graham, which took place nearly three months ago, Graham states, among other things, that he did not think Baldwin's behavior on set was unusual for an actor of his caliber; that actors do not commonly inspect prop firearms; that an actor should never have to worry about a gun being handed to him loaded; and that he thinks individuals other than Baldwin should be held responsible for Hutchins'

death. Graham, a camera operator with firsthand knowledge of conditions on the set of *Rust* whose exculpatory statements have been known to the State for months, has never been listed on the State's witness list. And the recording of his interview with Rice was not disclosed by the State until after the May 6, 2024 deadline for witness disclosures.

There's more, still. Despite Baldwin's numerous requests for text messages and other communications from important witnesses that were in the State's possession, Baldwin waited months before the State finally disclosed them. Once they were disclosed, it was clear that the State had been withholding text messages involving several key witnesses that are extremely favorable to Baldwin's defense. The State also waited until May 14, 2024, to disclose dozens of previously undisclosed lapel videos from the SFSO that depict, among other things, the SFSO's search of Kenney's business. Meanwhile, the State has refused to answer routine questions about the lead detective's file and has refused to provide a copy of the binder itself, leaving Baldwin to guess at which materials came from the binder and which came from other sources, which makes it impossible for Baldwin to test Hancock's own knowledge of the investigation. Indeed, Baldwin has good reason to believe that documents are still missing, given that the State repeatedly stood on its implausible assertion that neither Detective Hancock nor Detective Cano kept handwritten notes in connection with the investigation—until those notes magically appeared (N.B., only after it was undeniable from witness interviews that the notes existed).

C. The State's Refusals to Correct or Verify Its Disclosures

The difficulty of keeping track of the State's late disclosures has been magnified by the State's haphazard and careless disclosure methods, such as uploading materials to a shared drive without notifying Baldwin what, when, or where new materials were being uploaded, which made it virtually impossible to determine when and what (if any) new discovery had been disclosed. Baldwin sought for months to meet and confer about logistical issues related to the State's

disclosures, but the State categorically refused to "communicat[e] verbally with members of the defense team" about *any* issue. Ex. V; *see also, e.g.*, Ex. P at 1-2 (email dated April 9 requesting "a couple minutes to touch base on a few logistics . . . to be efficient on some of these issues related to the evidence and witnesses," to which Morrissey replied, "Feel free to email me.").

With late disclosures continuing to pile up and critical pre-trial deadlines approaching, Baldwin continued to request more transparency from the State regarding discovery issues. On April 22, 2024, counsel for Baldwin "reiterate[d]" its request that the State "provide [Baldwin] with a notification that the defense share has been updated, and with respect to which file folder(s)" so that Baldwin "can appropriately prepare the defense." Ex. Q at 6. In response, the member of the prosecutorial team who had been managing the share drive stated, "Yes, it can be a challenge to notice what might have been updated within that mountain of data." *Id.* at 5. On April 25, counsel for Baldwin emailed again to notify the State about gaps in its expert disclosures, noting that the defense was "becoming increasingly concerned that materials do not make it to the share file that should." Ex. R at 1.

On April 30, 2024, following the pre-trial interview of Lucien Haag in which the Second Haag Report was disclosed for the first time, counsel for Baldwin sent a lengthy email about specific files that were missing and Baldwin's "overarching discovery concerns." Ex. S at 4. In the email, counsel for Baldwin proposed a new system of disclosure intended to eliminate gaps and confusion going forward, noting, however, that this system "does not resolve our ongoing concern that there appear to be materials that are not timely provided (or not provided at all) to the defense that ought to be." *Id.* The email continued:

> We note that in our last discussion [during Haag's pre-trial interview] it appeared that you are not familiar with the structure or content of the defense share site, though I understand from our conversation that you are now aware that the site does not appear to mirror your own files in a way that allows you to ascertain whether

> and when materials are being provided. This is substantial concern for the defense, in particular in light of the state's assertions regarding what the defense does and does not have access to. Please let us know how the State intends to address these issues, which have now come to a head in at least two interviews.

Id. Counsel for Baldwin concluded the email by stating, "As ever, we remain available for a constructive meet and confer to walk through any of these issues in order to achieve a more efficient resolution than perhaps can be had by email." *Id.*

The following morning, Morrissey responded that the State was "working to address any outstanding discovery issues as quickly as possible." *Id.* at 3. And she asserted, inexplicably, that the State had met all of its disclosure obligations to date. *See id.* ("We have continued to disclose discovery as we are required to do under the rules and will continue to take steps to ensure that all remaining discovery issues are addressed."). Counsel for Baldwin responded that same day, noting that the "[t]he State's unwillingness to discuss these issues only increases our concerns," and "reiterating [Baldwin's] request to have a meaningful conferral to address these issues and hear from the state how it intends to ensure compliance in light of the concerns . . . raised below (including what appear to be frankly logistical matters that both parties should have an interest in resolving efficiently)." *Id.* at 2. In response, Morrissey wrote that she and Special Prosecutor Johnson, as well as one of the State's paralegals, were "being granted full access to the defense share tomorrow morning (or so I'm being told) so that we can meet and confer with you in a manner that will meaningful and we can solve any remaining issues without relying on" a different paralegal, who had been, in Morrissey's words, "less than responsive to my requests." *Id.* at 1. By Morrissey's own admission, therefore, it was not until May 2, 2024—three days before the dispositive motion deadline and witness list cutoff date—that *anyone* from the State (other than a "less than responsive" paralegal) was given access to the defense sharedrive that Baldwin had been complaining about for months. Yet even after the State finally agreed to meet and confer to "solve

any remaining issues," the State *continued* to withhold critical documents (*e.g.*, the Third Haag Report, which Baldwin didn't learn about for another three weeks).

On June 5, 2024, with the above issues (and many more like them) continuing to mount, counsel for Baldwin requested additional time to speak with each of the Haags regarding the second and third reports, which were not disclosed until after their respective pretrial interviews, as well as additional time with Carpenter, whose interview the State terminated over Baldwin's objection based on an arbitrary two-hour limit set by the State. Ex. I at 4. In the same email, which identified numerous continuing discovery violations by the State, counsel for Baldwin requested that the State produce "[a]ny other materials subject to disclosure under *Brady*, *Giglio*, and their progeny, including any state analogs to the same." *Id.* As for the Haags, the State responded that it would provide follow-up interviews of the Haags, but that Baldwin's counsel would be "permitted to ask questions only about the two supplemental reports that you did not have at the time of the previous interviews." *Id.* As for Carpenter, the State responded as follows:

> [W]e believe two hours is ample time for pretrial interviews. If you choose to spend the first ninety minutes talking to a witnesses about his previous law enforcement experience when he is being called as an expert witness in the areas of gun safety on film sets, that is your decision. Please explain what areas/topics you feel you were deprived of during your interview with Mr. Carpenter and we will consider allowing some limited additional questioning.

As for Baldwin's request for *Brady/Giglio* materials, the State responded that "as it relates to law enforcement officers," it was "not aware of any" such materials, and that "[i]f there is anything specific you are interested in please say so." *Id.* at 3.

On June 10, 2024, Baldwin's counsel emailed the State to request a number of outstanding discovery items that had been repeatedly requested before, including: (1) confirmation that "there are no additional emails, text messages, notes, or recordation from any prosecutor or investigator for the prosecution of the state's communications (including meetings or interviews) with any

witnesses or potential witness in this case that have not been produced"; (2) a report that was prepared by its expert Paul Jordan, which Baldwin was not aware of until Jordan mentioned it during his pretrial interview on May 23, 2024, and which the State has yet to provide despite agreement from Mr. Jordan and the State that they would provide it (*see* Ex. J at 37:11-38:4); and (3) "any material subject to disclosure under *Brady*, *Giglio*, and their progeny, as well as for material subject to disclosure under 5-501(A)(5)-(6) and 5-501(G) NMRA." *Id.* at 1. In response to Baldwin's first request, Morrissey asserted that Baldwin "[has] received everything pursuant to 5-501 NMRA," therefore representing that in the two and a half years since the State's investigation began, not a single prosecutor or investigator employed by the District Attorney's office took a single note of a single conversation with a single witness. Ex. I at 1.[6] In response to Baldwin's second request, Morrissey stated, "I don't know what report you're referring to. Please be more specific." *Id.* And in response to Baldwin's third request, Morrissey asserted—

[6] In a follow-up email, counsel for Baldwin made clear that it was requesting "any notes that were taken by any members of the prosecution team from conversations with witnesses for which the defense was not present," excluding privileged work product. *See* Ex. X at 1 ("We are not requesting any mental impressions or other opinion work product, however notes that contain the statements that were made by the witness are discoverable under the NM Rules of Criminal Procedure."). Baldwin further noted that the State "has an affirmative duty to disclose documented witness statements" under Rule 5-501(A)(5) NMRA, and that "a 'statement includes notes that are in substance recitals of an oral statement.' *State of New Mexico, ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 26, 137 N.M. 258, 264 (citing Rule 5–501(G)(3))." *Id.* Counsel for Baldwin further made clear that its request for notes regarding any witness statements applied to any member of the prosecution team, "including but not limited to current and former prosecutors, investigators, and Victim's Advocates." *Id.* In response, Morrissey stated, "Ms. Reeb, Ms. Padgett and Ms. Carmack-Altwies have confirmed that they have no notes from the interviews they participated in (all of which were also recorded, thus lessening the importance for note taking)." *Id.* She did not confirm whether such notes had ever existed but were since destroyed, and at least one witness recalled that notes *were* taken during an interview with investigators at the District Attorney's office in Santa Fe. *See* Ex. W (Transcript of 4/1/24 Interview of S. Kenney) at 55:24-56:12.

notwithstanding all of the issues identified above—that "Brady/Giglio materials were provided to the defense on March 28, 2023." *Id.*

The above issues represent some, but far from all, of the State's discovery violations.[7] Yet the State fails to legitimately explain why, for example, an exculpatory report from the State's own expert sat in Morrissey's inbox for over eight months and was only disclosed when Baldwin inadvertently discovered it. Or why the State continued to make representations to the Court that contradict the undisclosed opinions of its own experts, even *after* it learned that Baldwin was never given access to those opinions. *Compare, e.g.*, Ex. M, at 17 (State's brief: "The notion that defendant's gun had been modified and not working properly prior to its seizure by law enforcement was . . . refuted by firearms and toolmark forensic experts"), *with* Ex. C, at 2 (Third Haag Report: "It seems unlikely . . . that these toolmarks are the result of the damage incurred during the FBI's impact testing because the axis of these striae is not aligned with the direction that the hammer would have engaged and applied pressure to the sear."). Or why the State continues to make every effort to complicate the defense of this case, without justification. *See, e.g.*, Ex. K (email dated June 12, 2024, informing Baldwin that if he wishes to call any of the State's experts at trial, he "will need to serve them [with subpoenas, which the State will not accept on their behalf] and pay for their fees, travel and lodging."). To this day, the State continues to be driven by one thing: to win at all costs. Both the U.S. Constitution and New Mexico law require the Court to remedy the State's misconduct.

[7] Upon request, Baldwin can present additional examples of the State's discovery violations *in camera*.

ARGUMENT

"The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials." *Williams v. Florida*, 399 U.S. 78, 111–12 (1970) (Black, J., concurring in part and dissenting in part). Indeed, "[m]uch of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution." *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring in the judgment). But there are too many prosecutions, and too many rights at stake, for courts to police the whole system themselves. Prosecutors, too, "bear significant responsibility in the administration of the law." *Matter of Chavez*, 2017-NMSC-012, ¶ 17, 390 P.3d 965. "It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

I. LEGAL STANDARD

Because of the unique role that prosecutors play in our system, they owe heightened discovery obligations under the Constitution. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985). Under *Brady*, the State is required to disclose favorable evidence to the defense upon request. *See State v. Turrietta*, 2013-NMSC-036, ¶ 35, 308 P.3d 964. Critically, the U.S. Supreme Court has held that the State violates a defendant's due process rights when it suppresses "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, *irrespective* of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added). Moreover, "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]." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995); *accord State v. Wisniewski*, 103 N.M. 430, 435, 708 P.2d 1031, 1036 (1985).

In addition to *Brady*, the State of New Mexico imposes even stricter discovery requirements. Specifically, Rule 5-501(A) NMRA provides that "[u]nless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment . . . the state shall disclose or make available to the defendant," among other things:

> [. . .]
>
> (3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;
>
> (4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;
>
> (5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and
>
> (6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

Rule 5-501(A)(3)-(6) NMRA. *See also State v. Allison*, 2000-NMSC-027, ¶ 8 n.1, 11 P.3d 141 (noting that Rule 5-501 NMRA "create[s] disclosure obligations beyond those required by the Due Process Clause").

To determine whether the remedy of exclusion is warranted, courts in New Mexico must consider three factors: culpability, prejudice, and lesser sanctions. *State v. Le Mier*, 2017-NMSC-

017, ¶ 15, 394 P.3d 959. Critically, courts do not define "culpability" as requiring a showing of bad faith. In *Davidson*, the lower court found that dismissal was warranted where the lead detective provided a "flawed" police report, because the police report's explanation as to why certain evidence was never collected indicated that the lead detective *had* collected the evidence, which was favorable to the defendant. 2024 WL 2889839, at *8. Dismissal was affirmed by the appellate court based on the district court's finding of "a high degree of culpability by the State, even though the [district] court fell short of labelling it as 'bad faith.'" *Id.* In any event, bad faith has been found in circumstances where, as here, the State failed to disclose evidence reflecting on a witness's credibility without providing a "reasonable explanation for [the] nondisclosure." *Mathis v. State*, 1991-NMSC-091, ¶¶ 14, 16, 819 P.2d 1302.

While the Court must address all three factors on the record, it need not find that all three of them weigh in favor of exclusion to find that exclusion is justified. *Davidson*, 2024 WL 2889839, at *6 (citing *Le Mier*, 2017-NMSC-017, ¶ 20). The standards are not "so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority." *Le Mier*, 2017-NMSC-017, ¶ 16. "Such a framework and such limitations would be unworkable in light of the fact that our courts' authority to exclude witnesses is discretionary . . . and courts must be able to avail themselves of, and impose, meaningful sanctions where discovery orders are not obeyed and a party's conduct injects needless delay into the proceedings." *Id.*

II. SEVERE REMEDIES ARE WARRANTED BASED ON THE STATE'S ONGOING DISCOVERY VIOLATIONS

A. The State Is Culpable For Its Discovery Failures

The State's culpability in failing to disclose favorable evidence in this case is undeniable. The State has "unilaterally withheld" evidence favorable to Baldwin's defense, *State v. Harper*,

2011-NMSC-044, ¶ 17, 266 P.3d 25, including "evidence dealing with . . . credibility" that "could be expected to have a significant impact on the jury," *Mathis*, 1991-NMSC-091, ¶ 14, while failing to provide any "reasonable explanation" for its nondisclosure, *id.*, ¶ 16. Even if the State's failures have been unintentional (which is unlikely), they have been caused by the State's own "intransigence" in refusing to facilitate Baldwin's access to the discovery he is entitled to, *State v. Harper*, 2011-NMSC-044, ¶ 17, 266 P.3d 25, and are, "at a minimum," sufficiently reckless to warrant dismissal, *Davidson*, 2024 WL 2889839, at *8.

Although the State has represented, as recently as this week, that "Brady/Giglio materials were provided to the defense on March 28, 2023" (Ex. K), the facts above demonstrate otherwise. Less than three weeks ago, Morrissey *admitted* that the "failure to disclose the 8/31 supplemental [Haag] report was mine." Ex. F. Morrissey offered no explanation for her failure other than that she "did not" email the report to Baldwin when she thought she had. *Id.* A more plausible explanation for Morrissey's failure is that she concealed it because it undermines the State's theories and the expert opinions on which they are based. Indeed, Morrissey had no trouble disclosing the First Haag Report, which generally supports the State's theories. And, seven months later, when Baldwin indicated that the State had never disclosed any other reports from the Haags, she was quick to disclose the Second Haag Report—because that report also generally supports the State's theories. But at that point, despite Morrissey's knowledge that Baldwin had only ever seen the First Haag Report, and despite her ability to easily locate the Second Haag report "under Luke Haag's files" on the State's server, the State ***still*** failed to disclose the Third Haag Report—the only report of the three that is favorable to Baldwin's defense. If the State's failure to disclose the Second Haag Report was a mere oversight, it is hard to see how its failure to disclose the Third Haag Report was, too. Regardless, once the State was on notice that Baldwin only knew about the

First Haag Report, the State had a duty to confirm it had disclosed all three reports. Its failure to do so was, at a minimum, extremely reckless—especially after Baldwin *repeatedly* warned the State that its disclosures were inadequate. *See, e.g.*, Exs. P-S.

Similarly, Morrissey *acknowledges* that the State's delay in disclosing dozens of audio recordings that contain statements favorable to Baldwin's defense is "unacceptable." Ex. F. Yet Morrissey provides no explanation for the delay other than her investigator's negligence and the fact that some of the recordings somehow ended up in her "spam" box. *See id.*; *see also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995) ("It is well settled 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]."); *accord State v. Wisniewski*, 103 N.M. 430, 435, 708 P.2d 1031, 1036 (1985).[8] Yet there is no "unacceptable delay" or "spam" exception to the State's duty to disclose evidence favorable to the defendant. *See Brady*, 373 U.S. at 87 (a violation occurs when the suppressed evidence "is material either to guilt or to punishment, *irrespective* of the good faith or bad faith of the prosecution") (emphasis added); *Davidson*, 2024 WL 2889839, at *5 ("Our Supreme Court . . . does not attempt to limit the use of sanctions, including the sanction of dismissal with prejudice, when the state either breached some duty or intentionally deprived the defendant of evidence, or where material evidence has been suppressed and the suppression of this evidence prejudiced the defendant."). As to another audio recording—

[8] The members of the prosecution team who are subject to the State's discovery obligations include the current and former Special Prosecutors, current and former paralegals and investigators who have been involved in the case, any other attorneys from the District Attorney's office who have been involved in the case in any capacity (including, without limitation, Mary Carmack-Altwies, Jennifer Padgett, and Kent Wahlquist, among others), and any law enforcement officials or agencies that have been involved in the case.

of a witness who was inside the church when the accident occurred—Morrissey is simply "unsure" why it was "never uploaded to the server." Ex. F. Nor can the State be excused from its obligations based on the fact that one of its paralegals was "less than responsive" to Morrissey's requests for information about the State's disclosures, which Morrissey evidently only began to make more than a year after her appointment. Ex. S at 1. *See United States v. McCluskey*, No. 10-CR-2734 JCH, 2012 WL 13081295, at *3 (D.N.M. May 11, 2012) ("A prosecutor may not avert *Brady* obligations by keeping himself ignorant or compartmentalizing information").

Absent a severe remedy, the State will continue to abuse the discovery process as it has done from the beginning of its investigation. Even in the past few days, when Morrissey was asked about a document prepared by another State's expert that the expert and the State both agreed to provide to the defense, Morrissey responded, "I don't know what report you're referring to." Ex. I at 1. *Exactly*. Regardless of whether the State's discovery violations have been unintentional (which, under the circumstances, is hard to believe), the State's singular focus on obtaining Baldwin's conviction has caused the State to lose sight of its ethical obligations and forgo any efforts at transparency. It took *months* for the State to investigate Baldwin's disclosure concerns, let alone have a meaningful discussion about the issues Baldwin had repeatedly raised. *See supra* at 13-17. It was not until *four days* before the dispositive motion deadline that the State finally agreed to have a conversation about these issues, at which point the Special Prosecutors could not answer basic questions about how the defense share drive worked or what was on it—*because they didn't even have access to it themselves*. Without having access to the State's own disclosures, Morrissey could not have represented, in good faith, that the State "[has] continued to disclose discovery as we are required to do under the rules." *See* Ex. S at 1-2.

Had the State agreed to meet and confer to ensure that Baldwin had access to all discovery, it is possible that at least some of the State's more egregious nondisclosures (like the Third Haag Report) could have been prevented. Instead, the State consistently rejected Baldwin's appeals for order and transparency, refusing to even pick up the phone to try to address Baldwin's concerns in an efficient or responsible manner. Similarly, had the State taken *any* steps to confirm whether it had complied with its obligation to disclose statements by all of its experts, it would have learned *months* ago—well before the end of pretrial interviews and the dispositive motion deadline—that numerous statements had not been disclosed. Instead, on at least half a dozen occasions, the disclosures came during or after the witness's pre-trial interview, so that Baldwin had no opportunity to review the materials ahead of time. *But see* Rule 5-501(A)(4)-(5) NMRA ("within ten (10) days after arraignment or the date of filing of a waiver of arraignment . . . the state *shall* disclose or make available to the defendant . . . any results or reports of physical . . . examinations, and of scientific tests or experiments . . . made in connection with the particular case," and "*any* statement made by [any expert] witness") (emphasis added).

The State has conducted itself, at best, with reckless disregard for Baldwin's rights under *Brady* and 5-501 NMRA. *See Davidson*, 2024 WL 2889839, at *8 (finding a "high degree of culpability" and affirming dismissal, despite no finding of bad faith, where the State "recklessly or grossly negligently lost" evidence favorable to the defendant).

B. Baldwin Has Been Prejudiced By The State's Misconduct

Baldwin has been severely prejudiced by the State's misconduct. If the Court does not exclude the evidence, testimony, and argument that Baldwin seeks to have excluded, the prejudice will only multiply. The State did not withhold these materials for a week, or even for a month or two. It withheld them for *entire chapters* of this case, during which time they made numerous

representations to the Court suggesting that the functionality of the gun was on the State's mind the entire time.[9] Meanwhile, the State withheld the Third Haag Report and Carpenter's emails for almost a *year*, throughout the entire time that a defendant would decide investigative steps to pursue in response to the State's theories of guilt. *See United States v. Lujan*, 530 F. Supp. 2d 1224, 1255 (D.N.M. 2008) ("Exculpatory evidence will usually require significant pretrial investigation to be useful to a defendant at trial"); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure."); *United States v. McVeigh*, 923 F. Supp. 1310, 1315 (D. Colo. 1996) ("[T]he purpose of the *Brady* duty of disclosure is to give the defendants a fair opportunity to prepare their defenses well in advance of the trial.").

This is a case where Baldwin's alleged "guilt" is "highly equivocal," and the evidence withheld by the State would have "strengthened tremendously" Baldwin's preparation of his defense. *Davidson*, 2024 WL 2889839, at *8. If the State had disclosed the Third Haag Report eight months ago, when the State first received it, the State would have no good-faith basis to make

[9] The State has taken the position that Baldwin must have pulled the trigger with increasingly aggressive certainty over the past few months. *See* No. D-101-CR-2024-0013, "State's Response to Defendant's Motion to Dismiss the Indictment with Prejudice Based on the State's Destruction of Evidence" (May 21, 2024), at 5-6 ("Defendant pulled out his revolver, containing a live bullet. He cocked it, pointed it at Halyna Hutchens and pulled the trigger."); *id.* at 11 ("[D]efendant cocked the revolver and pulled the trigger ejecting the round that hit and killed Halyna Hutchins."); *see also* No. D-101-CR-2024-0013, "State's Response to Alexander Baldwin's Motion to Dismiss the Indictment for Failure to Allege a Criminal Offense" (May 21, 2024), at 9 ("If Mr. Baldwin . . . followed the safety protocols and did not point the gun at Mr. Hutchins and Mr. Souza, cock it and pull the trigger, Ms. Hutchins would be alive, and Mr. Souza would not have been seriously injured."); *id.* at 14 ("[H]e violated decades-old guns safety and set safety standards by pointing the gun at a person, cocking it, and pulling the trigger"). These assertions of fact (and others like them) were made on the *very same day* that the State first acknowledged the existence of the undisclosed Haag report.

statements such as, "The defendant simply doesn't have a leg to stand on concerning his claim that the hammer of the gun was modified" (Ex. M, at 18); or that "forensic testing concluded that . . . the alleged modification of the hammer was simply damage caused when the FBI struck the hammer with the mallet so many times that it finally damaged the hammer and sear" (*Id.* at 17). The same is true for the State's emails with Carpenter. It would be difficult for the State to make those arguments with a straight face if Baldwin knew that yet another expert hired by the State believed the gun may have been modified in a way that "compromise[d] the safety integrity and/or the operation of the gun." Ex. G. And it would have been impossible for the State, in good faith, to elicit the testimony it elicited from Carpenter before the grand jury if it had disclosed those emails in advance. *Compare, e.g.*, Ex. N at 160:23-25 (MORRISSEY: "You don't have any reason to believe this gun was altered, do you?" CARPENTER: "No."), *with* Ex. H ("Though I see no reason (operationally) why that modification exists, it remains to be seen definitively if it compromised the safety and function of the revolver and who/where/why it was preformed [sic] in the first place."). And the same goes for Haag. *Compare, e.g.*, Ex. N at 150:6-17 (MORRISSEY: "Does any of the evidence that you looked at support the proposition that there was anything at all wrong with the gun on the -- on October 21st, 2021?" HAAG: Based on my review of the FBI's notes of their examination, their reported conclusions, what they said they did, and the fact that the pieces that are broken fit with what they said they did when they broke it . . . all of those components together, by physical evidence, indicate the revolver was working properly."), *with* Ex. C, at 2 ("It seems unlikely . . . that these toolmarks are the result of the damage incurred during the FBI's impact testing because the axis of these striae is not aligned with the direction that the hammer would have engaged and applied pressure to the sear."). Similarly, had the State disclosed Graham's interview when it was recorded in March, Baldwin would have had weeks to contact Graham or

make other investigative decisions before it was too late to add Graham or anyone else to the witness list. Indeed, Graham may have provided Baldwin with the names of other crew members who, like him, believe specific individuals other than Baldwin should be held responsible for Hutchins' death. *See United States v. Reid*, 553 F. Supp. 3d 882, 893 (W.D. Wash. 2021) (rejecting government's argument failure to produce audio recordings until three weeks before trial did not prejudice defendant).

The State apparently believes that it can undo the prejudice it has caused by acknowledging its "unacceptable" delay or by belatedly disclosing a massive volume of materials, including many that are favorable to Baldwin's defense, weeks before trial. That strategy—trial by ambush—is grossly prejudicial and abhorred by courts. *See Le Mier*, 2017-NMSC-017, ¶ 25 (dismissal affirmed where State's incomplete disclosures "subjected [defense counsel] to the possibility of trial by surprise"); *id.* ("[T]he chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush") (quoting *Scipio v. State*, 928 So.2d 1138, 1144 (Fla. 2006)). The reason for that is obvious: Baldwin has had to divert substantial time and resources just to pursue the growing list of undisclosed discovery that continues to emerge from hiding—not to mention the time it takes to review more than 100,000 pages of documents and countless hours of audio recordings and videos that have been dumped on Baldwin just weeks before trial. Moreover, the vast majority of the State's late disclosures were made *after* the dispositive motion deadline, and much of it is relevant to Baldwin's motion to dismiss based on the State's destruction of the firearm. This alone demonstrates how seriously Baldwin has been prejudiced by the State's misconduct. *See, e.g.*, *Biles v. United States*, 101 A.3d 1012, 1020 (D.C. Cir. 2014) ("[T]he suppression of material information can violate due process under *Brady* if it affects the success of a defendant's pretrial suppression motion."); *McCluskey*,

2012 WL 13081295, at *8 (*Brady* violation occurs when the government fails to disclose material "in time for a defendant to make meaningful use of it"); *United States of Am., Plaintiff, v. Brant Daniel, Defendant.*, 2021 WL 2808706, at *3 (E.D. Cal. July 6, 2021) ("In most cases, this means the prosecution must disclose evidence 'in time for it to be of use at trial,' . . . But there are exceptions for 'certain pretrial proceedings, such as suppression hearings,' when information must be produced sooner."); *cf. United States v. Raddatz*, 447 U.S. 667, 677–78 (1980) ("[T]he resolution of a suppression motion can and often does determine the outcome of the case; this may be true of various pretrial motions.").

It is equally troubling that much of the favorable evidence that the State initially failed to disclose was only disclosed because Baldwin accidentally stumbled across it (*e.g.*, the supplemental Haag reports and statements by other experts) or because the State cryptically disclosed it on the defense share drive—like a needle in a haystack—without notice to Baldwin, while ignoring Baldwin's repeated requests to meet and confer regarding these exact issues. *See supra* at 21 (citing Exs. P-S). Baldwin has been seriously prejudiced by the State's failure to timely disclose favorable evidence of all kinds, but particularly that which relates to the core theory of guilt that the State intends to argue at trial: the alleged functionality of the firearm and Baldwin's alleged pulling of the trigger. *See Allison*, 2000-NMSC-027, ¶ 20 ("[M]erely continuing the case and excluding the circumstances surrounding the arrest is an inadequate cure for the prosecutor's failure to disclose the evidence to Defendant, especially considering the manner in which the prosecutor used the information in closing."). The State should not be allowed to benefit from its misconduct.

C. Lesser Sanctions Will Not Be Effective

Finally, given that the State continues to engage in gamesmanship even after being forced to acknowledge its "unacceptable" conduct only shows that serious sanctions are required to correct the State's misconduct. The State continues to defy basic norms, *e.g.*, refusing to accept service of a trial subpoena on behalf of its own experts (Ex. K); refusing to disclose a copy of the lead detective's investigative file; refusing to produce notes taken by Special Prosecutors or members of the DA's Office; refusing to disclose more than a hundred thousand pages of material, which Baldwin had been requesting for months, until right before trial and after the pretrial interview deadline; refusing to make expert disclosures before the scheduled interviews of the State's experts; and more.

The State continues to show contempt not only for Baldwin, but for the entire legal framework under which the State is required to conduct this prosecution. *See McCluskey*, 2012 WL 13081295, at *9 ("[T]he government's duty to disclose material evidence favorable to the accused is rooted in the premise that the sovereign's ultimate interest in criminal prosecution is not to maximize convictions for their own sake, but to ensure that 'justice shall be done.'"). There is no way to check the State's relentless abuse of power or to facilitate the transparency and fairness Baldwin is entitled to under the Constitution and New Mexico law other than to issue an order with the remedies Baldwin has requested.[10] Indeed, the State's track record in this case—and

[10] *Brady* materiality is impossible to assess before trial because it requires assessing the effect of the suppressed evidence on the fairness of the entire trial. Therefore courts "should ordinarily require the pre-trial disclosure of all exculpatory or impeachment evidence" without regard to materiality. *United States v. Carter*, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004); *accord United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) ("[The materiality] standard is only appropriate, and thus applicable, in the context of appellate review."). Given the "speculative" nature of any pretrial judgment on materiality, *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005), this Court need not conduct a materiality analysis to conclude the State violated its constitutional duty under *Brady*.

Morrissey's willingness to make representations about the State's compliance when she had no firsthand knowledge as to whether those representations were true—raises serious questions about whether the State is *still* refusing to comply with its obligations under *Brady* and Rule 5-501 NMRA. Considering the multiple (and likely ongoing) discovery violations by the State in this prosecution, the Court should grant Baldwin's motion.

CONCLUSION

Based on the above violations under *Brady* and Rule 5-501 NMRA, Baldwin respectfully requests the following:

(1) An order dismissing the indictment with prejudice;

(2) In the alternative, if the Court declines to dismiss the indictment under the legal framework outlined above (which requires dismissal), it should grant leave for supplemental briefing on Baldwin's Motion to Dismiss the Grand Jury Indictment (filed March 14, 2014) and dismiss under the legal framework applicable to that motion;

(3) At minimum, to reduce the prejudice that the State's misconduct has caused:

  (a) Preclusion of all testimony, evidence, and argument related to the State's contention that Baldwin must have pulled the trigger;

  (b) Immediate disclosure of the State's final witness list so that Baldwin can properly test the evidence and witnesses the State will offer at trial;

  (c) Immediate disclosure of all outstanding document productions, including answers to all of Baldwin's questions relating to the State's investigation, with redactions submitted to the Court for *in camera* review as appropriate; and

  (d) An order requiring the State to provide a log of all communications between or among any member of the Santa Fe Sheriff's Office, District Attorney's Office, Special Prosecutor's Office, and any witness who has contacted or been contacted by any of the foregoing entities.

The State's repeated violations of its sacrosanct duty of disclosure warrants dismissal—which is exactly what other courts have done in analogous circumstances, and Baldwin should not be treated differently. At a minimum, Baldwin is entitled to *at least* the remedies articulated above.

Date: June 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, a true and correct copy of the foregoing brief was emailed to opposing counsel.

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